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No. .....

MAY 1 1987

In The

Supreme Court of the United States

October Term, 1986

LOTTIE PRATT and JoANN ALRED,

Petitioners,

v.

JACK SHOEMATE, SUPERINTENDENT OF THE OSAGE INDIAN AGENCY; JAMES WATTS, SECRETARY OF THE INTERIOR; JOSEPH LEE SHUNKAMOLAH, JR.; GLADYS BELLE ROUWALK; MARGARET CECILIA ROUWALK; CECIL FRANK ROUWALK; JOSEPH LEE SHUNKAMOLAH; MICHAEL STEVEN PRATT TOYEBO AND ETHEL CAROL ROUWALK, LEGATEES, DEVISEES AND HEIRS OF THE DECEDENT, MARGARET SHUNKAMOLAH,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

THE QUESTION is whether the Circuit Court has decided a federal question in a way contrary to the reasoning of this Court in *Tooahnippah v. Hickel*, 25 USC 600, and to the thrust of settled Indian probate law and has negated a federal act by affirming a decision of the Interior Secretary approving a Will and codicil which disinherit petitioners, two daughters of an Osage Indian Testatrix, a ward of the government who the Secretary found suffered from senility, confusion, hallucinations and ill health when the Will and codicil were made and who, at such time, had been secluded by Will proponents from Petitioners for more than a decade. Because it relies exclusively upon Oklahoma law and implicitly denies existence of Secretarial discretion to disapprove such instruments, such decision has created vast uncertainty in the small but important field of Indian probate law and will lead to numerous appeals unless corrected.

LIST OF PARTIES

THE PARTIES are the Superintendent of the Osage Indian Agency, Bureau of Indian Affairs; William P. Clark, Secretary of the Interior; Joseph Lee Shunkamolah, Jr., Gladys Belle Rouwalk, Margaret Cecilia Rouwalk, Cecil Frank Rouwalk, Joseph Lee Shunkamolah, Fred Shunkamolah, Michael Steven Toyebo and Ethel Carol Rouwalk.

Petitioners have moved the United States District Court for the Northern District of Oklahoma and the 10th Circuit Court of Appeals to dismiss the Superintendent and Secretary as defendants but their motions have been denied. They ask they be permitted to file a similar motion with this Court for reasons which will be set forth in such motion.

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No. .....

In The

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October Term, 1986

LOTTIE PRATT and JoANN ALRED,
PETITIONERS,

VERSUS

JACK SHOEMATE, SUPERINTENDENT
OF THE OSAGE INDIAN AGENCY, ET AL,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

Petitioners move this Court to issue a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals entered in the above entitled case on November 21, 1986.

OPINIONS BELOW

THE OPINIONS BELOW appear in the Appendix as Exhibits "A" through "F" and are the unreported Memorandum, Osage Agency Solicitor, "A"; the Regional

Solicitor's Opinion reported as ID, BIA, #IA T-39, "B"; the unreported USDC, ND, Okl opinion "C"; the unreported 10TH CCA OPINION TO BE REVIEWED, dated November 21, 1986, "D", and such Court's ORDER DENYING REHEARING dated February 4, 1987, appearing as "E".

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JURISDICTION

JURISDICTION IS invoked under 28 USC 1254(1). INITIAL APPELLATE JURISDICTION is based upon the Act of October 21, 1978, Pub. L. 94-496, 92 Stat. 1660.

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STATUTORY PROVISIONS INVOLVED

EXCERPTS OF STATUTES INVOLVED relating to the Osage Tribe appear in "F" of the Appendix and are the 1906 Allotment Act, "F-1"; the 1912 Will Act, "F-2"; the 1925 Limitation upon Inheritance Act, "F-3"; and the 1978 Act amending the 1912 Act, "F-4," while 25 USC 373, pertaining to Wills of Indians other than Osage and Five Civilized Tribes Indians, appears as "F-5."

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STATEMENT OF THE CASE

A. Although this case and Tooahnippah v. Hickel are analogous, the Circuit Court Opinion affirmed Secretarial approval of an Osage Indian Will which effectively disavowed Secretarial disapproval duties, negated a federal Act and wrongfully employed Oklahoma Will approval aids.

The *1912 Osage Will Act* (F-2) denies validity to Osage Indian Wills devising federally restricted property unless such Wills are first approved by the Interior Secretary.

A 1978 Amendment (F-4) struck from the *1912 Osage Will Act* its reference to Oklahoma law as a Will approval standard substituting therefore a requirement of Will execution in accordance with Oklahoma law.

25 USC 373 pertaining to Indian Wills other than those of Osage and Five Civilized Tribe Indians, is analogous to the *1912 Osage Will Act* in wording, legislative history, statutory network and requirement for Secretarial approval. It was construed in *Tooahnippah v. Hickel,* 25 L.Ed.2d 600, as granting Secretarial Will disapproval power exceeding that of a state court in a non-Indian case and suggests close scrutiny be applied where, as here, the Will disinherits a child.

Petitioners contend Secretarial Will approval was intended for the protection of Indian heirs. Here, however, the Circuit Court did not recognize the existence of Secretarial Will disapproval duties but held Oklahoma law "fully adequate" to determine the validity of the Osage Testatrix' Will despite its disinheritance of Petitioners in favor of a third daughter, Gladys, and members of Gladys' family, the Proponents.

Ignoring *Tooahnippah's* reasoning and relying exclusively upon Oklahoma law as a standard, the Department found Testatrix suffered from senility, confusion, hallucinations and ill health and that she had been secluded from Petitioners by Proponents for more than a decade when the Will and Codicil were executed *but* held that:

> ". . . under Oklahoma case law the criteria for determining testamentary capacity does not impose a high standard of physical stamina or mental acuteness." (B-6)

It then mis-read and employed, without authorization, an Oklahoma doctrine of substantial compliance in an effort to cure a defect of Will declaration shown by 84 Okla. Stat. 55, and employed an Oklahoma presumption to find proof of due execution flowed from attestation clause recitations of due execution and that proof of testamentary capacity flowed from such proof of due execution. The Department then held the burden rested upon Petitioners, *who proponents had excluded from Testatrix for more than a decade,* to prove lack of due execution and testamentary capacity and to establish undue influence (A-4).

Oklahoma law, however, applies only to the *execution* of an Osage Will for the 1978 Amendment to the *1912 Osage Will Act* struck from the latter its reference to Oklahoma law as a Will approval standard and substituted therefor a single requirement the Will be "*executed*" in accordance with Oklahoma law. (F-2 & 4). Moreover, the *1912 Osage Will Act* (F-2) barred such use of the attestation clauses of the instruments by providing that:

> ". . . no such will shall . . . have any validity unless approved . . . by the Secretary."

Furthermore, the use of such antithetical, non-Indian *Will approval aids* in this case was barred by the *heir protective intent* of the Federal Acts and by *Tooahnippah's* suggestion of *close scrutiny.*

Despite Department decrial of Oklahoma case and statutory Will standards and despite Department reliance upon Oklahoma doctrine and presumptions fashioned for use in cases *not* involving Indian law, the Circuit Court upheld the Secretary's *exclusive* reliance upon Oklahoma law as Will approval standards by saying (E-3), it had:

> ". . . no reason to believe that Congress did not consider Oklahoma statutory and common law fully adequate for determining the validity of the will."

Tooahnippah's majority and concurring opinions hold, however, that under Section 373, while the Secretary may not exercise his Will approval power to substitute his testamentary intent for that of the Indian, that 25 USC 373, its statutory network and legislative history, reflect government intent to protect such Indians from improvidence, overreaching and exploitation and that Secretarial approval may (and, petitioners contend, *must*) be withheld in appropriate cases though the same scheme of disposition by a non-Indian of unrestricted property might pass muster in a conventional proceeding. In amplifying the basis of the majority opinion, the concurring opinion added that if the Will disinherited a natural object of the testator's bounty, it should be *closely scrutinized.*

At no point, however, did any lower tribunal make use of or follow *Tooahnippah's* reasoning and at all points such tribunals relied *exclusively* upon their reading of Oklahoma law as a standard of approval of the Testatrix' Will.

Given the 1978 repealer of Oklahoma law as a Will standard, save as to execution, such reliance was misplaced and was contrary to Congressional intent, as shown by the Congressional Committee of the Whole Colloquy preceding its passage, and was contrary to the interpretation placed upon the *1912 Osage Will Act* by the *Department Memorandum of Charles Fahy, Acting Solicitor, addressed to the 1st Assistant Interior Secretary on August 25, 1933.* Although preceding *Tooahnippah*, the Memorandum fully parallels the reasoning and conclusions reached by this Court in *Tooahnippah* in respect to the Will of a Comanche Indian.

The Memorandum recognizes that the Osage Acts confer upon the Secretary a broad spectrum of discretionary power designed to enable him to protect Osage Indians in the enjoyment of their property *and to protect the heirs of Osage decedents in respect to the Wills of such decedents.* Speaking to a variety of instances concerning the exercise of such discretion, Fahy referred to *Anicker v. Gunsberg*, 246 U.S. 166, where this Court said Secretarial discretion to approve leases of restricted Indian land was granted:

> ". . . for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation."

The Memorandum also notes the observation of the Idaho Court made in *Snyder v. Raymond*, 287 P. 478, that 25 USC 373, the statute construed in *Tooahnippah*:

> ". . . clearly evinces the purpose of the sovereign not to part with its title to any trust lands by reason of any will whatsoever until it is assured the rights of its wards have been protected."

Also noted was the decision of the Oklahoma Court of *Wah-hrah-lum-pah v. To-wa-a-he*, 188 P. 106, based on the *1906 Osage Allotment Act* granting to Osage Indians rights of inheritance, which held:

> "The act of Congress is not only for the benefit of the allottee, but *also for the benefit of his heirs.*"

Further emphasizing the *"heir-protective"* nature of the Indian acts, *Fahy* noted *Davis v. Williford*, 271 U.S. 484, where, in referring to the acknowledgement required of Choctaw wills by 34 Stat. 137, this Court said:

> "It is clear that it was intended . . . to prevent a full-blood Indian from being overreached and imposed upon, and induced for an inadequate consideration or by trickery, *to deprive his heirs of their inheritance* . . ."

Having thus established the purpose of such Acts, Fahy noted that in *In re Wah-she-she-me-tas-he's Estate*, 239 P. 177, the Oklahoma Court said of the Secretary's will disapproval duty enjoined upon him by the *original 1912 Osage Will Act* that:

> "It must . . . be conceded that *it is not incumbent upon the Secretary . . . to approve the will of an Osage Indian although the will was in strict accordance with the laws of the State.*"

The Memorandum also notes the Committee of the Whole colloquy concerning passage of the original *1912 Act* and the emphasis it placed upon the need of Osage Indian heirs for protection and *thus fully paralleled* this court's reasoning and holding regarding 25 USC 373, the Act considered by it in *Tooahnippah*.

Despite the decisional analogy between 25 USC 373, as construed by *Tooahnippah*, and the *Osage Will Act*, as construed by the *Fahy Memorandum*, the Circuit Court held, in affirming approval of the Will and Codicil of the mentally incompetent, unduly influenced testatrix, that it had:

> ". . . no reason to believe that Congress did not consider Oklahoma statutory law fully adequate for determining the validity of the will." (E-3)

Such holding thus supplants *Tooahnippah's* reasoning in the small but Indian important field of Osage Indian law and challenges its holding in other fields of Indian law as well.

B. The clear weight of the evidence shows the will was not executed as required by law.

The *sole* requirement of the *1912 Osage Will Act*, as amended in 1978, (F-2 & 4) is that the will be ". . . *executed* in accordance with the laws of . . . Oklahoma . . ."

84 Okla. Stat. 55 requires there be two attesting witnesses and that the testator:

> ". . . must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will."

Hoefling and Byrne signed the Will. Hoefling testified Testatrix declared to him that the instrument was her Will. Byrne, however, testified Testatrix made no statement to him directly or indirectly concerning the instrument nor did he testify to any act or conversation upon the basis of which a declaration could be assumed but

referred to the instrument at all times as *"the paper"* or *"whatever papers there were."*

Although the Department found the Will scrivener testified to Will declaration, a declaration to one not an attesting witness does not satisfy the statute. Nor was it satisfied by a request made by the scrivener to Byrne out of Testatrix' presence on a day prior to the Will execution.

While the Department held, contrary to the *heir-protective* nature of the federal acts and to *Tooahnippah's* suggestion of *close scrutiny* that under Oklahoma case law (B-6):

"Substantial compliance is all that is required."

Oklahoma case law no longer governs and if it did the record does not show either compliance or substantial compliance with the Oklahoma statute and close scrutiny would forbid its use.

Thus, *Price v. Price,* Okla, 1971, 479 P.2d 952, held a request made by a testator's son out of testator's presence to a ranch hand that he witness the son's father's will was insufficient to satisfy such doctrine where the sole evidence of a Will declaration by the testator to a ranch hand was testator's affirmative answer to the son's question of "Dad, is this the way you want this to be.", the Oklahoma Court saying:

> ". . . where there was only one other attestation, execution of the will failed for lack of required two attestations. 84 O.S. 1961 Section 55."

The Regional Solicitor further sought to show due execution by saying (B-5):

> "The fact that the will is 'self proved' is significant under Oklahoma law which provides that the testi-

mony of witnesses may be made unnecessary by a self proving affidavit.'' (Citing 84 O.S. 55.5) (B-5)

84 Okla. Stat. 55.5, however, contradicts such holding by providing that:

> ''A self-proved testamentary instrument shall be admitted to probate without the testimony of any subscribing witness, unless contested, but otherwise it shall be treated no differently than a will codicil not self-proved.''

The Will being contested, the self-proving statement did not establish the necessary declaration to two witnesses. Moreover, both witnesses appeared and testified with the results heretofore shown.

Close scrutiny would bar the result reached by the Circuit Court.

C. The Testatrix was mentally incompentent when the instruments were executed.

The Department found (A-19), contrary to its finding of ''testamentary capacity'' that the record was:

> ''. . . replete with testimony of . . . decedent's hallucinations. The decedent imagined that there was a little girl around her . . . people being on the road . . . old stink Frances Pipestem was looking and laughing at her . . . three ladies out at the garage taking new boards off and replacing them with old boards; people in the television when it was turned off . . . a little girl came to see her and other children were playing around her . . . On another occasion she had her coat and scarf on and some clothing packed waiting for her mama to come after her . . .''

It also held that:

> ". . . the record . . . reflect(s) that the decedent was subject to senility, confusion, hallucinations and ill health . . ." (A-19)

and pointed to evidence (A-12) of Testatrix' limited English vocabulary and to medical practitioner O'Leary's testimony that on November 16, *1977* the Testatrix was unresponsive to questions because of an impairment of mental faculties creating an inability to reason and to exercise cognizant functions due to senility. The record showed Testatrix believed her war-killed son, Stanley, to be alive. Testatrix' son, Joe, testified Testatrix was *"out of it" in 1978.* Father Byrne, who signed the Will, testified:

> ". . . with regard to her . . . mentality . . . all I know is that she gave recognition to me as a person and I have to use the word "seemed" seemingly was aware of directions when she was asked to sign the paper . . ."

The Will is dated *April 17, 1978* and the codicil July 22, 1978. Medical records of Dr. Jordan, Testatrix' physician show Testatrix:

> ". . . had loss of mental competency and function and probably as early as *1977* was medically, mentally incompetent."

Testatrix' hair dresser, Gilpin, testified she started fixing Testatrix' hair in 1976 and saw her each two or three months but would have to tell her who she was and then Testatrix could not remember and a few minutes later would ask if Gilpin was the nurse and would say she was in the Doctor's office and would remove a shoe

and ask Gilpin to look at her foot. A grandchild testified that at times Testatrix would not recognize her immediate children and another witness testified Testatrix could not remember the witness' identity during the course of a short conversation.

The Regional Solicitor's justification for Will approval upon the basis that:

> ". . . Oklahoma case law . . . does not impose a high standard of physical stamina or mental acuteness."

and the Department failure to employ discretion and its exclusive reliance upon Oklahoma law was not justified and was contraindicated by the *heir protective* nature of the federal acts and by *Tooahnippah's* suggestion of *close scrutiny.*

Robert v. Mielke et al, Okla, 431 P. 2d 35, notes that:

> "Where witnesses are silent on a vital issue of which it appears they have knowledge, their failure to testify may be considered by the court in determining the mental competency of a testator."

Here Proponents had full access to Testatrix for more than a decade during which the instruments were executed during which time Petitioners were totally excluded from Testatrix' presence. Yet, not one Proponent testified to a single issue.

Department findings of due execution based on attestation policies and testamentary capacity based on internal Will statements were barred by the *1912 Act* provision that an Osage Will should not:

> " . . . have *any* validity unless approved . . ."

It follows that both ordinary and close scrutiny would require a holding that the Testatrix lacked mental competency requisite to Will approval at the times the instruments were executed.

D. Secretarial approval should have been denied the Will and Codicil because they were products of undue influence.

Petitioners relied both upon (1) proof of undue influence and (2) a presumption of undue influence arising from proof of the confidential relationship between Gladys and the Testatrix, as found by the District Court (D-10), and proof of the numerous badges of undue influence shown by the record and by Department findings.

Ignoring record proof of undue influence, the lower tribunals centered their attention upon the presumption and found it overcome by proof that Stuart, the employer and Banker for Gladys, had given Testatrix impartial and confidential advice. The record, however, shows Stuart never advised Testatrix in respect to the Will drawn by Kamins, Gladys' attorney, which is the Will now before this Court, but that he had discussed with Testatrix, months before her execution of the Will before the Court, a draft of another Will which had been drawn by another attorney, Payne.

Nor was Stuart ever shown to have ever known of the existence of the *codicil* which is now before this Court.

The transcript also shows Stuart admitted he did not know of the existence of the Will now before the Court until a copy was sent him by Kamins. Kamins testified the only copy he believed Stuart saw was one he sent Stuart

after Testatrix had died. Stuart admitted he never talked with Testatrix in regard to the Kamins Will and admitted his conversation with Testatrix concerned an earlier draft of another will which had been drawn by another attorney, Payne.

Finally, Stuart admitted his conversation with the Testatrix concerning *a* will:

> ". . . took place, approximately . . . in the latter part of *'77.*"

The Will, however, is dated April 17, *1978* and *the* codicil July 22, *1978.* Thus the finding of the District Court that:

> "Stuart was in a position to advise her impartially and confidentially, which he did."

is wholly meaningless in terms of the Will and codicil now before the Court and did not overcome the presumption of undue influence.

Nor did Stuart advise Testatrix impartially or confidentially for he employed Gladys to care for Testatrix and accepted advice from her while her indebtedness to him increased until the death of Testatrix and he also admitted discussing the Payne Will draft with Gladys and having in his possession a copy of the Payne Will draft bearing interlineations and changes in her handwriting.

Kamins, Gladys' attorney, who drew the will and codicil before the Court, testified Petitioners had charged Stuart before the Osage Indian Council with improper expenditure of and failure to account for Testatrix' funds and:

". . . of course he was upset about all of this too, D. J. Stuart, Jr."

Thus the presumption was not overcome in respect to the Will and since Stuart was not shown to have known of the codicil it was invalidated by the presumption and in any event the evidence, absent the presumption, clearly established the exertion of undue influence. (See *Anderson v. Davis,* Okla, 1952, 256 P.2d 1099; *Haynes v. 1st National State Bank of N. Jersey,* 432 A. 2d 890 and *Estate of Gelonese,* 36 Cal. App. 3d 854, 11 Cal. Rptr. 833).

In placing upon Petitioners the burden of proof in respect to undue influence, the Department (A-4) ignored the heir protective nature of the Osage acts, *Tooahnippah's* suggestion of close scrutiny and congressional purpose in conferring upon it Will approval power. Proof of undue influence, however, clearly appears from findings and proof shown by the record that the Testatrix suffered from "senility, confusion, hallucinations and ill health" (A-19); that proponents denied Petitioners access to Testatrix for more than a decade during which the Will and codicil were executed; that the principal beneficiary participated in the formulation and drafting of a precursor of the Will; that the Will and codicil were executed in Gladys' home and in her presence and with her aid; that both instruments were drafted by Gladys' previously suspended and subsequently debarred attorney who brought his own Will witnesses with him from Tulsa to Hominy, Oklahoma, and who consisted of the scrivener's wife, employees, Shakely products partner, Priest and himself, all of whom, with the exception of the scrivener, being strangers to the decedent; that such attorney pre-

sided over the execution of such instruments; that the Testatrix was then residing with Gladys and relied upon her for her needs, etc.

Such proof established undue influence by the clear weight of the evidence. (See *Anderson v. Davis, supra; Haynes v. 1st Nat'l State Bank of N. Jersey, supra,* and *Estate of Gelonese, supra.*) *Anderson v. Davis, supra,* states, for example, that *but*:

> "*Slight evidence* is sufficient to set aside a will on the ground of undue influence when a confidential relationship exists between the testator and the beneficiary."

while *White v. Palmer,* Okla, 1971, 498 P. 2d 401, says that:

> ". . . if from the surrounding circumstances . . . it appears that *any* undue influence has been exerted, the Court should not admit the Will to probate."

Here the District Court found (D-10) a confidential relationship existed between Gladys and Testatrix and such relationship, coupled with the proof shown, should, under the above cases, as well as when closely scrutinized (*Tooahnippah*), result in a finding of undue influence.

The action of Gladys' attorney in preparing the instruments was attributable to her (*McFarland v. Farwell,* Cal, 1936, 60 P. 2d 499) and *Haynes v. 1st Nat'l Bank of N. Jersey, supra,* a case closely analogous to this case states that:

> "A strong taint of undue influence is permitted where the attorney represents both the testatrix and principal beneficiary."

Close scrutiny should hold no less.

Testatrix' enormous physical and mental disabilities also weigh heavily for *Anderson v. Davis, supra,* points out that:

> "What degree of influence will vitiate a will depends upon the bodily and mental vigor of the testator."
>
> Close scrutiny should hold no less.

Gladys' forcible exclusion of Petitioners from Testatrix for more than a decade was also entitled to great weight. 79 Am. Jur. 2d *Wills* 443 thus observes:

> "Denial of access of relatives at the time the testator makes his Will is always considered a circumstance of more or less weight tending to prove undue influence."

The application of close scrutiny or the placement of the burden of proof upon Proponents rather than the disinherited, testatrix-excluded Petitioners, would require reversal of the Department's holding and such proof in an Oklahoma setting would result in a denial of the Will to probate.

———o———

REASONS FOR GRANTING THE WRIT

The Writ should be granted because the Circuit Court has decided a federal question in a way in conflict with the applicable decision of this Court entered in *Tooahnippah v. Hickel* and in a way which raises important and unresolved questions. The opinion negates the 1978 Amendment and holds Indian probate cases should be governed by antithetical will-approval definitions, doctrine, presumptions and burdens of proof crafted by Oklahoma Courts

for use in non-Indian cases. It permits mental competency to be defined in terms of a minimal state court definition and approves misapplication of an Oklahoma doctrine of substantial compliance. Barred from use of the Will before its approval (F-2), it permits proof of due execution by an attestation clause and holds proof of testamentary capacity flows therefrom and places upon Petitioners the burden of proving lack of due execution and mental competency and/or the existence of undue influence despite the requirement of Secretarial pre-probate approval, Proponents having barred Petitioners from access to Testatrix for more than a decade, its own findings of mental incompetency and undue influence and *Tooahnippah's* suggestion of close scrutiny. It ignores the heir-protective intent of the federal acts and supplants *Tooahnippah's* reasoning in the field of Osage Indian probate law.

Absent guidelines, cases such as this Will continue to be ruled by the subjective sentiments of such Solicitors.

WHEREFORE, Petitioners move this Court to issue its writ and thereafter reverse and remand the decision of the Tenth Circuit Court with instructions to deny Secretarial approval to the Will and codicil of the decedent.

Respectfully submitted,

SHOEMAKE & SHOEMAKE
Attorneys for Petitioners

By: Shockley T. Shoemake

EXHIBIT "A"

UNITED STATES DEPARTMENT OF
THE INTERIOR

IN THE MATTER OF THE WILL AND CODICIL OF Margaret Shunkamolah, Osage Allottee No. 71, deceased	)))))	HEARING NO. 81-104

ORDER APPROVING WILL

Pursuant to 25 CFR 17.1(d), evidence in the matter of the approval of the will and codicil of Margaret Shunkamolah was presented before the Field Solicitor, Pawhuska, as special attorney for the Superintendent of the Osage Agency. Following presentation of testimony and other evidence, the special attorney prepared the record of the case and submitted his recommendations in conformity with 25 CFR 17.10. The Superintendent, having reviewed the record and the written transcription of testimony herein and considered the recommendations of the special attorney, finds as follows:

I. *Findings of Fact*

1. THAT decedent died on January 16, 1981, at the age of 87, a resident of Hominy, Oklahoma;

2. THAT decedent was an Osage Indian who, at the time of her death, owned property subject to the jurisdiction of the Superintendent of the Osage Agency consisting of 3.59166 Osage headright and surplus funds;

3. THAT at the time of decedent's death, she was survived by the following named persons, who presumably

constitute her heirs at law under provisions of the laws of the State of Oklahoma:

Lottie A. Pratt, daughter
Gladys Belle Rouwalk, daughter
Joseph Lee Shunkamolah, Jr., son
JoAnn Shunkamolah Alred, daughter

4. THAT at the time of decedent's death, a purported will, executed April 17, 1978, and codicil thereto executed July 22, 1978, named as beneficiaries the following parties:

Lottie A. Pratt	Ethel Carol Rouwalk
Gladys Belle Rouwalk	Cecil Frank Rouwalk
Joseph Lee Shunkamolah, Jr.	Michael Steven Pratt Toyebo
JoAnn Shunkamolah Alred	Joseph Lee Shunkamolah
Margaret Cecilia Rouwalk	Fred Shunkamolah

5. THAT notice of hearing on the approval of the purported will and codicil of decedent was given as required by 25 CFR 17.4 to all interested parties; and that proof of such notice has been incorporated into the record of the case;

6. THAT hearings were held in Pawhuska, Oklahoma, on approval of the purported will and codicil before the special attorney for the Superintendent of the Osage Agency; that testimony was taken and evidence introduced at that hearing; and that thereafter the special attorney prepared the record of the case in conformity with 25 CFR 17.10 and recommended that the will be approved.

The Superintendent further finds as follows:

II. *Conclusions of Law*

1. THAT all wills and codicils executed by Osage Indians must be approved by the Superintendent of the Osage Agency under provisions of the Act of October 21, 1978, Pub. L. No. 95-496, 92 Stat. 1660, and pursuant to 25 CFR 17;

2. THAT the purported will, dated April 17, 1978, and codicil thereto dated July 22, 1978, meet the requirements of the laws of the State of Oklahoma for a valid will and codicil in that they are written dispositions of property evidencing testamentary intent of the decedent which have been signed by decedent and two witnesses in each other's presence;

3. THAT the proponderance of the evidence establishes that at the time of the execution of the purported will and codicil, decedent, in a general way, understood and knew the nature and situation of her property, the relation in which she stood to those persons who might naturally have some claim to her bounty, and the effect and consequences of her act upon that property and those persons;

4. THAT the proponderance of the evidence establishes that the purported will and codicil were not executed as a result of fraud, duress, or undue influence practiced upon the decedent;

5. THAT the dispositive provisions of the purported will and codicil relative to the decedent's property are not in violation of Federal statutes pertaining to the devolu-

tion of property which is subject to Departmental jurisdiction.

6. THAT the fact that the decedent devised the bulk of her estate to certain children, to the exclusion of others, does not, of itself, establish a lack of testamentary capacity.

THEREFORE, IT IS ORDERED that the last will and testament dated April 17, 1978, and codicil thereto dated July 22, 1978, of Margaret Shunkamolah be, and the same is hereby, APPROVED.

This decision and order is final unless notice of intention to appeal is filed with the Superintendent within fifteen (15) days from the date of mailing of notice of this decision and that appeal is perfected, in accordance with provisions of 25 CFR 17.14, within thirty (30) days from the date of mailing of the notice of this decision.

Dated this 22nd day of October, 1982, at Pawhuska, Oklahoma.

/s/ Jack S. Shoemate
Superintendent, Osage Agency

UNITED STATES GOVERNMENT
MEMORANDUM

Date:
October 22, 1982

Reply to atten of:
Field Solicitor, Pawhuska

Subject:
Self-proved will dated April 17, 1978, and self-proved codicil dated July 22, 1978, of Margaret Shunkamolah, Osage Allottee No. 71, deceased (restricted)

To:
Superintendent, Osage Agency

In accordance with the Act of October 21, 1978, Pub. L. No. 95-496, § 5(a), 92 Stat. 1660, this office notified the interested parties concerning hearings on the subject will, and hearings were conducted relative thereto.

Margaret Shunkamolah died on January 16, 1981, at the age of 87, a resident of Osage County, Oklahoma, owning 3.59166 Osage headright interest valued at $690,891.78 and cash of $115,722.98, which are subject to the jurisdiction of the Department of the Interior. If the said will and codicil are not approved by you, the Department, or the court, said property would vest in equal shares in her presumed heirs at law, Glayds Belle Rouwalk, Lottie A. Pratt, Joseph Lee Shunkamolah, Jr., and JoAnn Shunkamolah Alred.

The dispositive provisions of said will relative to said property are as follows:

(A) To Gladys Belle Rouwalk, 2 Osage headrights;

(B) To Margaret Cecilia Rouwalk, Ethel Carol Rouwalk, and Cecil Frank Rouwalk, 1 Osage headright interest in equal shares;

(C) To Joseph Lee Shunkamolah, Jr., .591966 Osage headright interest;

(D) To Margaret Cecilia Rouwalk, Ethel Carol Rouwalk, Cecil Frank Rouwalk, Joseph Lee Shunkamolah, and Fred Shunkamolah, grandchildren; and to Gladys Belle Rouwalk as Trustee for Michael Steven Pratt Toyebo, great-grandson, until he reaches the age of 18 years; $5,000 cash each;

(E) To Lottie A. Pratt and JoAnn Shunkamolah Alred $5 cash each;

(F) To Gladys Belle Rouwalk, the rest, residue and remainder of the estate.

The codicil corrected the decimal amount of Osage headright interest to Joseph Lee Shunkamolah, Jr., to read

.59166; substituted the Osage Agency as Trustee for Michael Steven Pratt; and provided that the cash bequests be made from undistributed Osage headright income and that the executrix procure a court order prior to expending any funds.

Gladys Belle Rouwalk filed a petition for the approval of said will and codicil. Lottie A. Pratt, through her attorneys, Shoemake and Briggs, filed a contest to said will and codicil. JoAnn Alred and her attorney, T.F. Dukes, filed a joint contest thereto. The contest of Lottie A. Pratt provides as follows:

(1) At the time of the purported execution of the purported will the decedent was incompetent to make a will;

(2) At the time of the purported execution of said purported will the decedent was acting under undue influence;

(3) The instrument offered as the will of the decedent was not executed and attested as by law required;

(4) The dispositive features of said instrument do not meet the requirements of the federal acts which govern the approval of such instrument and do not bring the instrument within the intent of the Congress as shown by the governing acts;

(5) The contestant Lottie A. Pratt, is a daughter of the decedent.

Shoemake and Briggs, on behalf of Lottie A. Pratt, adopted the contest of JoAnn Alred. The contest of JoAnn Alred provides as follows:

(1) That at the time of the making of the Will and Codicil and for many years prior thereto Margaret Shunkamolah was an aged, infirm and senile person. That she was mentally incompetent to handle her personal and business affairs and in fact was under conservatorship through the District Court of Osage County, Oklahoma, and had been for many years;

(2) That she lacked testamentary capacity to make a Will and did not know the extent of her property, the persons entitled to benefits of her estate and such Will and Codicil as submitted herein was not her free and voluntary act;

(3) That at the time of the making of the Will and of the Codicil Margaret Shunkamolah was acting under duress and undue influence of her daughter, Gladys Rouwalk, who had kept her isolated without contact with other members of her family and had so controlled her mind business affairs. (sic) That all of the acts of Margaret Shunkamolah were not of her own free will and accord but those of Gladys Rouwalk and those acting for, by, through or under her or in her behalf to benefit her own immediate, personal life and those of her children;

(4) That the Will was not executed in the manner, form and terms as provided by law and does not meet the Oklahoma Statutory Requirements of a good and valid Will; and in peticular (sic) it is stated that the signatures appear highly irregular and it is questioned and objected to with a statement that such signature is not completely hers, but it was forced formed or traced or written by some other person other than Maragret Shunkamolah;

(5) That the Last Will does not meet the standards or requirements of the Federal laws in reference to distribution of assets and property;

(6) That the Will is not a natural Will, it is not just and equitable to those entitled to benefits and attempts to disinherit or (sic) daughter JoAnn Alred who has been interested in her mother's welfare and has tried to protect her and her property in the best manner that she could or knew how. That Gladys Rouwalk poisoned her mother's mind against her and used false statements, unjust ac-

cusations and bitter animosity towards her for the purpose of having her mother disinherit her under the terms of her Will. That this contestant is entitled to have the Department of the Interior and it's (sic) officers to examine the background, life history, character and conduct of Margaret Shunkamolah and those exercising control over her to see that the circumstances surrounding the making and execution of this Will and Codicil were highly improper, unjust, inequitable and such as to violate all the standards and requirements in reference to the making of a free and voluntary Last Will;

(7) That JoAnn Alred thus objects to the approval of the Will and Codicil and states that the same is not entitled to approval by the Department of the Interior or the Superintendent of the Osage Indian Agency or persons with delegated authority to approve the same and states that she is entitled to have the same disapproved.

The burden of proof of the proponents and contestants of a will is enunciated by the Oklahoma Supreme Court in *Brown v. Thomason,* 354 P.2d 451, 452 (Okla. 1960). Syllabus No. 3 thereof provides as follows:

> The proponents of a will are required, under the law, to make a prima facie showing that the instrument tendered for probate was executed and attested in the manner provided by statute, by a person possessed of testamentary capacity, acting voluntarily and not under duress or undue influence. In case of a contest on the grounds of lack of formality in the execution and attestation, of lack of testamentary capacity of the testator, or upon the ground that the testator was acting under duress or undue influence in the execution of the instrument, and a prima facie showing has been made by the proponents entitling the will to probate, the burden rests upon the contestants to establish some ground of contest which would destroy the instrument as a will.

The court, in the syllabus of *Hobbs v. Mahoney,* 478 P.2d 956, 957 (Okla. 1970), stated:

> Where the attestation clause recites due execution of a will, it creates a prima facie case of due execution of the instrument, which can be overcome only by clear and convincing evidence.

The court, in Syllabus No. 2 of *Brown v. Brown,* 287 P.2d 913, 914 (Okla. 1955), stated:

> In a will contest, where due execution and attestation are established, a presumption of testamentary capacity arises, and the burden of proving unsoundness of mind of testator is upon the contestant.

It is the opinion of this office that the attestation clauses of the decedent's will and codicil and testimony of the subscribing witnesses hereinafter described establish a prima facie showing of the due execution and attestation of the decedent's will and codicil. The proponents having made a prima facie showing of the validity of the will, the burden rests with the contestants to establish grounds to invalidate said will and codicil.

Testamentary capacity was defined in Syllabus No. 2 of the court in *In Re Williams Estate,* 249 P.2d 94 (Okla. 1952), as follows:

> A person has testamentary capacity when his mind and memory are such that he knows, in a general way, the character and extent of his property, understands his relationship to the objects of his bounty and to those who ought to be in his mind on the occasion of making a will, and comprehends the nature and effect of the testamentary act.

The court in *In Re Estate of Bracken,* 475 P.2d 377, 380 (Okla. 1970), said:

> . . . Advanced age, senility, confusion, and ill health are insufficient to justify denying probate of a will if testator possessed testamentary capacity at the time of execution. In re Williams' Estate, 207 Okl. 209, 249 P.2d 94; King v. Gibson, 207 Okl. 251, 249 P.2d 84. . . .

A person's hallucinations will not invalidate his will unless such hallucinations affect the making of the will. 94 C.J.S. *Wills* § 17 (1956), provides:

> . . . It is not true that no person who is insane may make a valid will, since a testator may be insane in the medical sense and yet have testamentary capacity; there must be either such a complete derangement as denotes utter incapacity or a specific insane delusion or hallucination which affects the making of the will.

Mr. Kamins testified that he first met the decedent in about 1972 (Page 13 of Transcript); that he first commenced discussing business matters with her in late 1977 or early 1978 (Page 5 of Transcript); and that during this period of time she discussed with him the drafting of her will; that predicated on a conference with her and a draft of a will prepared by Harvey Payne, said will was drafted; that on the day of the execution of the will, he conferred with her privately and alone in her bedroom and read the will to her and then they went to the dining room where the subscribing witnesses and notary public were present, at which time he asked Gladys Rouwalk to leave; that he then handed the will to the decedent and asked her if she understood the document and she stated that it was her will; that he further asked her if he had reviewed and discussed said will with her and she acknowledged that he had; that he asked her if this was her last will and properly expressed how she wanted her estate to be divided upon her death and she acknowledged that it did; that she understood that the people were present to see her sign her will (Pages 6 and 7 of Transcript); that she then signed said will in the presence of himself and all the witnesses and that the witnesses signed in the presence of the decedent, and in the presence of each other, and all in the presence of a notary public, and that the notary public affixed her notary seal thereto (Page 8 of Transcript). He further testified that said will was then mailed to the Solicitor and the Solicitor sent him a letter (Exhibit 2), wherein certain changes were recommended (Page 9 of Transcript); that he then informed the decedent and that the decedent told him to prepare the codicil (Page 10 of Transcript); that she indicated

to him her desire to execute it; that the decedent executed said codicil in the presence of the witnesses and the witnesses signed in the presence of the decedent and in the presence of each other and the notary (Page 11 of Transcript). He further testified that on April 17, 1978, and July 22, 1978, the decedent had testamentary capacity and that she knew what her estate was and how she wanted it to be divided on her death (Page 12 of Transcript).

Mr. Kamins testified that he was suspended from the practice of law for the period from July to November of 1977 (Page 56 of Transcript). On April 16, 1982, he resigned from the Oklahoma Bar Association and, on April 26, 1982, his name was stricken from the roll of attorneys. 53 O.B.J. 1358 (1982). The fact that Mr. Kamins was suspended from the practice of law and his name later stricken from the roll of attorneys does not ineffectuate the prima facie showing of the proponents. This is only material as it relates to his credibility as a witness.

Mr. Mark Hoefling testified that his signature appeared on said will; that he first saw said will on April 17, 1978, that he accompanied Mr. Kamins to the decedent's residence in Hominy, Oklahoma; that he was employed by Mr. Kamins at that time (Page 57 of Transcript); that he had never met the decedent before (Page 60 C of Transcript); that he briefly conversed with the decedent; that thereafter Mr. Kamins and the decedent went into the bedroom for about 15 minutes and no other persons were present in that room (Page 60 B of Transcript). He further testified that Mr. Kamins announced that this was the decedent's last will and testimony; that she acknowledged that; that the decedent signed it, he signed it, Father Byrne signed it, and Mr. Kamins' secretary signed and notarized it, all in the presence of each other (Pages 58 and 59 of Transcript). He further testified that "she was mentally competent." (Page 59 of Transcript). On cross examination, he testified that Mr. Kamins asked the decedent if she understood that it was her last will and testimony and she replied, "Yes;" that Mr. Kamins announced that he and Father Byrne were to be witnesses to her will and she acknowledged that (Page 60 C of Transcript).

Edmund F. Byrne testified that he was the Priest of the Holy Family Cathedral of Tulsa, Oklahoma; that he had been in the clergy for 42 years; that at the request of Mr. Kamins, he went with Mr. Kamins to Hominy, Oklahoma, for the purpose of being a witness to the decedent's will; that he was seated across the table from the decedent and that she seemed to acknowledge his identity, not because they had met before, but because of the Roman collar (Pages 62 and 62 of the Transcript); that he said a few brief words to her and from that point he did not carry on too much of a conversation. He was asked if he had an opportunity to observe Margaret Shunkamolah and did he form an opinion as to her competency on that date. He answered, "So far as I was aware, she seemed to be aware of what was going on. I am just giving my own impressions because of the conversation and several things that occurred there. Mr. Kamins explained things privately apparently in another room to her and then she came back and was there when she signed the papers there, whatever papers they were." (Page 63 of Transcript). She did not say to him directly that this was her last will and testament. He was asked the question, "Did she state to you whether or not this was her last will and testament?" and he answered, "She did not say that to me directly." He was asked the question, "Did she sign this document that is purported to be her last will and testament?" and he answered, "Yes, I noticed that, because I, she had a little difficulty physically insofar as actually signing of it, so I, I was on the opposite side of the table, so I didn't see the actual signature, but she was moving her hand and signing it, but I didn't actually see it." (Page 64 of Transcript). He further testified that the decedent signed in his presence, then he signed and then Mark Hoefling signed after him. (Pages 65 and 66 of Transcript). He was asked, "Were you of the opinion that Mrs. Shunkamolah did this under her own free will or do you feel that she was acting under duress?", and he answered,

> A. Of course, in a siutation like that, I was asking myself the same question because I wouldn't care to testify or be a witness to anything that would

> involve pressure or coercion, I mean anything of that nature. Although I was not coached or told by anyone about the nature of the thing, but after being in the clergy for 40 years, I know frequently we have to have witnesses sign documents, and so this was going through my head although I did not express this to anybody. So I paid particular attention to her physical appearance and attitude. I am putting this in a negative way, but I didn't see any signs of pressure except with regard to eye sight problem might have been a little poor with regard to, and the process of writing or signing. But I'm just giving my own personal impression. She seemed to know what she was doing, insofar as signing. I didn't see any indication otherwise. (Page 65 of Transcript).

On cross-examination, he was asked "What specific conversation do you recall hearing Margaret Shunkamolah have with any person pior to the time of the execution of the will?" and he answered, "I, I could not at this moment recall the nature of any conversation that went on. I know that—because I was across the table, in fact, I wasn't paying too much attention to whatever discussion was going on or talking, it was going on, but I wasn't paying attention to it. (Page 68 of Transcript).

Further on cross examination, he was asked the following questions and gave the following answers (Page 73 of Transcript):

Q. So both Mr. Kamins and the daughter went into the other room—

A. Yes.

Q. —with Mrs. Shunkamolah there?

A. Yes, that is correct.

Caron L. Kamins testified that she was married to Gerald Kamins; that Jon L. Keylor rode to Hominy with her and Mr. Kamins. She did not believe that Marcy Lyles was present on that date; that the decedent and Mr. Kamins

were in another room. She testified that the decedent was "back in another room talking with my husband about, I guess, the will." (Page 78 of Transcript). When asked the question, "Did you see any other persons accompanying them back to the other room?", she answered, "No." (Page 78 of Transcript). She further testified that "my husband asked if she understood everything or—if there was any questions. And she said she understood it all or something like that." (Page 79 of Transcript). Mrs. Kamins was asked, "Did she, did Mrs. Shunkamolah indicate whether she understood what she was doing?", and she answered, "She indicated that she understood exactly what she was doing, to me." (Page 79 of Transcript). She further testified that the decedent executed the codicil in the presence of the witnesses and the witnesses executed it in the presence of the decedent and each other (Pages 79-80 of Transcript). She was asked the following questions and gave the following answers (Page 80 of Transcript):

Q. Did you have an opportunity to form an opinion as to her state of competency?

A. Yes, as best I could.

Q. And what was that opinion?

A. I felt she was very pleasant. She talked mainly to my little girl that we had.

Q. Do you understand what I mean by the term "competent"?

A. Sane? (Laughs)

Q. Yes.

A. Yes, she seemed very sane, to me.

Q. All right. Did she appear to be acting under any person's influence or duress?

A. No.

On cross-examination she testified that she did not know the decedent prior to the date of the execution of the codicil. (Page 81 of Transcript).

The court reporter's transcript or proceedings taken on October 11, 1976, *In the Matter of the Guardianship of Margaret Shunkamolah, Osage Allottee No. 71*, No. PG-76-15 (Dist. Ct. Osage County, Okla., Oct. 11, 1976), was introduced into evidence as Exhibit No. 5. At the hearing on a Petition for the Appointment of a Guardian for Mrs. Shunkamolah filed on behalf of JoAnn Alred, Joseph Shunkamolah, and Lottie Pratt, the testimony of Mrs. Shunkamolah caused the petitioner's attorney to state, "I am of the opinion that we have not been able to establish 'mental incompetency,' " and requested permission of the court to amend the petition "to show rather than incompetency, that a conservator be appointed." (Pages 28-29, Exhibit 5). The transcript is replete with testimony that the decedent possessed testamentary capacity on October 11, 1976.

D. J. Saart, Jr., testified that he had been employed as a banker for nine years and is now employed at the First National Bank of Pawhuska and has held the position of Vice-President for seven years (Page 303 of Transcript); that he first became acquainted with the decedent in 1971; that he has handled her business since that date until the date of her death; that he has been her conservator since November of 1976 (Page 305 of Transcript). He testified that he had conferences with the decedent concerning the making of a will approximately two months after he became conservator; that he advised her that she should make a will and that she indicated that she would do that (Page 305 of Transcript). He was asked the following questions and gave the following answers (Pages 305-306 of Transcript):

Q. Did she indicate to you how she wanted to leave her property?

A. Yes, she did.

Q. What did she tell you?

A. She indicated to me that she wanted to leave the property to certain individuals, those individuals—

Q. Would you please specify those?

A. Those being, Gladys Rouwalk, Margaret Rouwalk, Carol Rouwalk, Joe Shunkamolah, uh, let's see, there was a Michael Pratt, she had indicated to me that Michael had always been her favorite grandson, and she wanted to make sure and leave him money. And she's indicated to me, that was because she virtually raised the boy. There was, uh, let's see, I'm trying to think if there were any others. I believe that was it.

He further testified that this took place the latter part of 1977. He was asked the following questions and gave the following answers (Pages 306-308 of Transcript:

Q. What did she have to say to you, with reference to her children?

A. Well, she told me that, uh, first of all, I'd tried to get to her to change the will, because I knew it was going to be contested, that she needed to leave all of her children something. And she was very adamant about not doing so. I recommended to her, a number of times, to make some changes, and why she needed to make the changes.

Q. What changes did you recommend that she make?

A. Well, I recommended that she give all of her children, all of her daughters and sons, leave them something in the will. She would not do it. She was mad about several things, she was very upset, first of all, that this conservatorship was ever set up.

. . .

Q. Just please tell the court what Mrs. Shunkamolah said to you, in her words, as best as you recall.

A. She told me, when I told her that she needed to make some changes on the will, she said not, she did not want to do that, she said they were mean to me, she said they embarrassed me, she said she

didn't like what they had done to her, and she said, no, she would not do it. And so, she told me that she didn't like, as far as Joe was concerned, she sa'd Joe, she said she's been giving him money all his life. That she wanted him to have some initiative and go out and do somethings himself. She said she put him through school, she'd bought him several cars, and she said she's already given him a lot. She told me that Lottie, that she'd given Lottie a house and had given Lottie land. And she said she sold the land, and she sold the house, and spent the money. She told me that she had bought groceries for practically all of them all of their lives, and provided their living. She was mainly mad at JoAnn because of the deal on the conservatorship. She said that she had raised their children, paid for their education, bought their children cars, and that was the main things that she said to me. That was the reason she didn't want to leave these people anything. So, we had some other business at that time to take care of, concerning she wanted to buy some furniture, and—

. . .

Q. Did you have any conversations with her in 1978 with reference to her will?

A. She did not want to do what I had recommended to her. And from that point on, she went and saw Gerald Kamins. This was without my knowledge. That was later, I believe in 1978, that I talked to Gerald Kamins, that indicated to me—

. . .

Q. How did you happen to see a copy of the will that he prepared?

A. Mr. Kamins mailed it to me.

Q. Did you ever discuss that will with Mrs. Shunkamolah?

A. Yes, I did.

Q. When did you discuss it with her?

A. Uh, right after I received the will, that she wanted me to keep in safekeeping for her, I still made recommendations to her that she needed to change that, that the will would be contested and that she needed to do something. She was still very adamant and indicated to me that it was going to stay the way it was.

Q. Mr. Stuart, with reference to her finances, did you advise her, with reference to her finances, before the conservatorship?

A. Yes, I did.

Q. During your conversations with her, were you able to form an opinion as to whether or not she understood who her children were, who her family was, who her heirs at law were?

A. Uh, she knew who her children were.

Q. Did you form an opinion as to whether she understood what she owned?

A. Yes, she knew what she owned. She knew how many headrights she had.

Zeke Parris testified as follows in response to the following questions (Page 285 of Transcript):

Q. Did you form an opinion as to Mrs. Shunkamolah's state of mind?

A. Yes.

Q. And what would that opinion be?

A. Well, she always acted pretty good mind to me.

Q. Did you ever change before her death?

A. Well, I don't know, I hadn't saw her, I never saw her, for about six months, maybe a year before her death.

Q. Until then, did her mind seem okay to you?

A. Well, her mind was okay to me, until then, I didn't see her then. She got probably sick, and she didn't feel like talking maybe, in the hospital, I don't know, I just wasn't around her much?

He testified that his wife worked for Gladys Rouwalk and that Gladys had given her "a few clothes and things like that."

Clara Inola Parris testified that she first met Mrs. Shunkamolah in 1970, had taken care of her at different times on a part-time basis during the succeeding years, and that while she took care of her, she talked to her. She was asked the following questions and gave the following answers (Page 295 of Transcript):

Q. Did you form an opinion as to her state of mind?

A. Well, naturally we know that all people like that are senile, even I think my husband is, but otherwise she was all right, she knew me and she always said I reminded her of her sister, Mary.

Q. What do you mean by senile?

A. Well, I don't know whether I can explain it or not, but I don't mean that she didn't have no right mind, I don't mean that, but you know, all people are kinda senile, when they get that old.

Q. You're going to have to tell the Judge what you mean by senile?

A. All right, I'll explain it to you. (laughing) My husband won't eat out of a plate, he's got to have a bowl, one of those little soup bowls, and he's got to have a certain knife and a certain spoon, now that's what I call senile.

. . .

Q. . . . Did she seem to have her right mind, to use your terminology, I'm referring to Mrs. Shunkamolah?

A. Yes.

. . .

Q. Did she seem to know who the members of her family were?

A. Yeah.

She further testified that Gladys Rouwalk gave her three blankets and two shawls after the death of Mrs. Shunkamolah.

Lottie A. Pratt, JoAnn Alred, Joseph Lee Shunkamolah, Jr., and the decedent's grandsons, Charles Pratt and Stanley Linford Smith, testified in opposition to the decedent's will and codicil. One or more testified that the decedent was in poor health, possessed a limited vocabulary of English, and was senile and subject to hallucinations. Lottie Pratt was asked the following questions and gave the following answers (Pages 127-128 of Transcript):

Q. Do you have an opinion, based on your observations of your mother and your conversations with her during the times that you were permitted to see and talk with her, and during the times that you did see her, as to whether or not, at the time the making of the will and codicil, which has been offered into evidence, your mother would know the natural objects of her bounty, that is to say, who would receive her property in the event she died without a will? Do you have an opinion as to whether she would know those persons?

A. I don't think she knew.

Q. Was she able to recognize you at all?

A. No.

Q. Do you have an opinion, mam, based upon your conversations with and your observations of your mother during the times that you did visit her, and your observations of her during the last times that you saw her, as to whether or not she would, upon the dates of the will and codicil offered herein, know the nature and purpose of a will? First of all, do you have an opinion, yes or no?

A. Yes.

Q. What is that opinion?

A. She wouldn't know.

Q. Do you have an opinion, mam, based upon your observations of your mother and conversations with her, and your observations of her during the last times that you saw her, whether or not she would know generally the nature and extent, etc., of her property? Do you have an opinion?

A. Yes.

Q. What is that opinion?

A. No.

Q. She would not?

A. No.

Q. Your answer is that she would not?

A. She would not.

On cross examination, Lottie Pratt was asked the following questions and gave the following answers (Page 128 of Transcript):

Q. I'm talking about prior to July 1978. When did you see her last?

A. I saw her about four years ago.

Q. You saw her four years from today, or four years from July, 1978?

A. Four years from 1978, July.

On re-direct examination, she made the following responses to the following questions (Pages 152-153 of Transcript):

Q. Now, you say that you saw your mother at Robinson's Cafe, in Wynona, and the year was 1974?

A. It was four years ago, yes.

Q. Four years ago, all right. And this is 1981. So that would have been 1977, is that correct?

A. Approximately.

. . .

Q. Did you then identify yourself to her?

A. Yes.

Q. How did you identify yourself to her?

A. I said, mama, I'm Lottie.

Q. What did she say?

A. She just was surprised and she said "Oh."

Q. She seemed to know who you were, even then?

A. She seemed to.

Joseph Lee Shunkamolah, Jr., testified as follows (Page 255 of Transcript):

Q. Do you have an opinion, sir, based upon your conversations with your mother and your observations of her, and the statements that she made to you, and the things which she observed concerning her, as to whether or not, from the year 1977 forward, as to whether she would know and be able to keep in her mind, at one and the same time, the natural objects of her bounty, that is to say, those who inherit from her, such as her children?

A. No, I don't think she would.

Q. She would not be able to keep them in mind?

A. No.

Q. Do you have an opinion, based upon the same matters, as to whether from 1977 forward, she would know the general nature and extent of her properties?

A. No.

. . .

Q. Do you have an opinion, sir, as to whether, from 1977 forward she would know the nature and purpose of a will?

A. No.

On cross-examination, he was asked the following questions and gave the following answers (Page 265 of Transcript):

Q. Okay. After 1976 when you left your mother's house—

A. Uh-huh.

. . .

Q. —when is the next time after that you can recall seeing your mother?

A. I don't remember.

Q. All right, can you give me an estimate as to what period of time transpired until you saw her the next time?

A. I don't remember.

Q. Did you have any telephone conversations with her during the period of time that you were absent from her house?

A. My mother?

Q. Yes.

A. No.

Q. So you don't know anything about her mental capacity or her understanding of the objects of her bounty or her children, or the nature of her property during the period of time that you were absent, do you?

A. I don't remember.

Charles Pratt, Jr., testified that the decedent was his grandmother; that he had lived with her and his mother practically all of his life until he went off to college and made the following responses to the following questions (Page 209 of Transcript):

Q. Do you have an opinion, sir, based on your observation of your grandmother and your conversations with her over the years, and your knowledge of her and your observation of her and conversations with her up until the time you last saw her in 1976, whether or not on, during the month of April 1978, and during the month of July 1978, your grandmother would have known the natural objects of her bounty, that is to say, those who would succeed to her property in the event she died leaving no will? Do you have an opinion?

A. Yes, sir.

Q. What is that opinion?

A. She wouldn't know.

. . .

Q. All right. Do you have an opinion based upon the same data as to whether, upon the same dates, your grandmother would know the nature and purpose of a will? Do you have an opinion?

A. Yes, sir, I do.

Q. What is that opinion?

A. She wouldn't know.

Q. Do you have an opinion, sir, based upon the same data as to whether your grandmother on the same dates would know the general nature and extent of her property? Do you have an opinion, yes or no?

A. Yes, sir, I do.

Q. What is that opinion?

A. She didn't know the extent of her property.

Stanley Linford Smith, also known as Tony, testified that he was the grandson of the decedent and spent considerable time with her in 1975 and 1976. He was asked the following questions and gave the following answers (Page 279 of Transcript):

Q. During the time that you spent with your grandmother, did you have an opportunity to form an opinion about her ability to determine the nature and value of her property or her belongings?

A. Yes.

Q. And what is that opinion, Tony?

A. That she wasn't really sure about what she, you know, in my opinion, she just didn't know.

Q. Do you feel that your grandmother would have known the natural objects of her bounty, would she have known and been able to consider all four of her children, at the same time?

A. No.

On cross-examination, he was asked the following questions and gave the following responses (Page 283 of Transcript):

Q. Would you please define for me "objects of her bounty?" What does that mean to you?

A. Values?

Q. I said "objects of her bounty."

. . .

Q. Do you know what it means?

A. No, I don't.

Irene Gilpin testified that she knew the decedent during her childhood and then moved away from Hominy and returned there in 1976, and that she was a beauty operator. She was asked the following questions and gave the following answers (Pages 188-190 of Transcript):

Q. Did you notice any changes, in respect to her, from the the time that you had seen her when you were thirteen, and the time that you were seeing her now, 1976?

A. Well, she couldn't remember who I was.

Q. What do you mean, she couldn't remember who you were?

A. Well, I'd tell her who I was, and she couldn't remember, I had to keep telling her who I was.

. . .

Q. You were doing her hair at that time?

A. Yes.

Q. When she was brought to the beauty shop, in 1976, by Gladys, did she know where she was?

A. Well, I don't think so. She kept telling me she was in the doctor's office or something, you know, she was confused, she kept, she would pull off her shoe and she'd tell me that she wanted me to look at it while she was there. And I just had to keep putting her in a chair, you know, she was sorta disoriented, you know.

. . .

Q. You say in 1976 when she would come into your beauty shop, she seemed to think she was in the doctor's office?

A. Well, she kept asking me if it was the doctor's office, and I'd tell her, no, I was doing her hair.

Q. And you say in 1976, that you would tell her who you were—

A. Uh-huh.

Q. And would she know five minutes later who you were?

A. Not really, she's ask me again several times while she was there.

. . .

Q. Did she recognize you when she'd come to your place in 1978?

A. No, she didn't—

Q. In 1978, what language would she speak to you?

A. Well, she spoke mostly in Osage.

. . .

Q. Do you have an opinion, maam, based on your observation of Mrs. Shunkamolah and your conversations with her, during the times you saw her in 1978 and throughout the time you saw her in 1978, whether or not during that time she would know the natural objects of her bounty, that is to say, those persons who would inherit from her if she left in a (sic) will? Do you have an opinion as to whether she would know those people, now just yes or no, do you have an opinion?

A. Yes, I have an opinion.

. . .

Q. What is that opinion, maam?

A. Uhm, she seemed sorta disoriented, I mean, you know. She didn't carry on a conversation with

me, you know, for any period of time. She just, well, she just disoriented as to where she was, most of the time. So that's the only conclusion I can bring, you know, that she was—

. . .

Q. Do you have an opinion as to whether, during that time, she would know what a will was? Do you have an opinion?

A. Well, I have an opinion. Do you want me to tell you?

. . .

Q. Do you have an opinion?

A. I don't really think she could, because she couldn't, she didn't carry on a direct conversation with me and she kept asking me who I was, you know, so, uh, that's all I have to base it on.

Q. Do you have an opinion as to whether, during that time, the year 1978, she would know the general nature and extent of her property, do you have an opinion?

A. I wouldn't think so. I wouldn't think, she wouldn't.

Charles O'Leary testified that he was a resident of Hominy, Oklahoma, and was a physician's assistant under John Hudson, M.D. (Pages 4-5 of Exhibit 9). He testified that he knew the decedent; that he first met her in the emergency room at the Hominy City Hospital on November 16, 1977; that he examined her on that date (Pages 6-7 of Exhibit 9). He testified "it is my impression that the lady was experiencing an anxiety reaction; that she also appeared to me to be senile and she also had a mildly elevated blood pressure." He also testified that she was unresponsive to his questions (Pages 7-8 of Exhibit 9). He was unable to elicit a history from the decedent; that it appeared to him to be the result of senility. (Page 9

of Exhibit 9) He testified that he saw her on July 3, 1981 (sic); "two days later on July 5, 1978;" and on June 11, 1980 (Pages 10, 12 of Exhibit 9). He further testified as follows (Pages 18-19, 26 of Transcript):

Q. What other symptoms do you have recorded? I can't read your writing.

A. I have recorded no real complaint, senile, doesn't verbalize well, those are all.

Q. What do you mean by senile?

A. Senile is a condition that is common with advanced age where individuals have impairment of their mental faculties.

Q. Impairment in what way?

A. They are unable to reason, to exercise cognizant function.

Q. Does senility effect (sic) people in varying degrees?

A. Yes, sir.

Q. Did you note the degree of senility that you felt that she had at that time?

A. No, sir.

Q. And isn't it also true that the degree of senility can fluctuate with a given person on a given day at a given time?

A. Yes, sir.

Q. And the activities that she's experienced previous to your observation and things such as her blood pressure, medicine that she may have been taking, will affect the apparent senility that you would ascertain, isn't that correct?

A. Yes, sir.

Q. How did you determine that that was the cause of her senility on these dates?

A. That's simply a subjective assessment.

The record is replete with testimony of the decedent's hallucinations, for example; The decedent imagined that there was a little girl around her (Page 25 of Transcript); people being on the road (Page 252 of Transcript); "old stink Francis Pipestem" was looking and laughing at her while she was in a cafe (Page 252 of Transcript); three ladies out at the garage taking new boards off and replacing them with old boards; people in the television when it was turned off (Page 255 of Transcript); a little girl came to see her and other children were playing around her; a man came into the house and sat in a chair and looked at her (Page 108 of Transcript); and a little girl standing beside her in the bank (Page 328 of Transcript). On another occasion she had her coat and scarf on and some clothing packed waiting for her mama to come after her (Page 254 of Transcript).

It is the opinion of this office that even though the record of the proceedings reflect that the decedent was subject to advanced age, senility, confusion, hallucinations, and ill health, these conditions are insufficient to deny approval of said will ad codicil, if the testator possesses testamentary capacity. This office is of the further opinion that the preponderance of the evidence reveals that the decedent possessed testamentary capacity in that she knew the objects of her bounty and the extent of her property.

The Department held in the *Estate of Marion Couper*, IA-T033 (Jan. 22, 1979) that a will of a deceased Osage Indian cannot be disapproved on the ground of undue influence unless the following elements are met:

(1) That the decedent was susceptible to the domination of another;

(2) That the person allegedly exerting the influence was capable of controlling the mind and action of the decedent;

(3) That the nature of the influence was calculated to induce or coerce the decedent to make a will contrary to his or her own desires; and

(4) That the will is contrary to such desires.

The Department further held therein that:

> If any one of the above elements is missing, an allegation of undue influence cannot be sustained. Mere opportuity to establish undue influence is insufficient, as is mere suspicion.
>
> Under Oklahoma case law, undue influence must be a "wrongful" influence such as is likely to destroy the free will and agency of the testator. . . .

The records reflects that Lottie A. Pratt, her children, and her mother (the decedent) lived together for the approximate period of 1955 to 1969; that during this period of time the Shunkamolah family were welcome in that home; that Mrs. Pratt took a trip and upon her return an argument ensued between Mrs. Pratt and Gladys Rouwalk concerning the health and care of the decedent; that Mrs. Rouwalk took over the custody of her mother at that time and continued such custody until the time of her death. The record is also replete with instances wherein Mrs. Rouwalk refused to permit the decedent's other children and her grandchildren and great-grandchildren to visit the decedent either in the decedent's home or the home of Mrs. Shunkamolah.

Joseph Lee Shunkamolah, Jr., was asked the following questions and gave the following answers:

> Q. Did Gladys influence your mother?
>
> A. Yeah, I think she did.
>
> Q. To what extent?
>
> . . .
>
> Q. All right, did your mother handle any business after she started living with Gladys?
>
> A. No.
>
> Q. Did your mother have control over her own comings and goings?

A. No.

Q. Did she have control over the comings and goings of others?

A. No.

Q. Did she have control over whether the children could come into the home?

A. No.

Q. Who controlled this?

A. Gladys.

It is the opinion of this office that the evidence relative to the influence and control that Mrs. Rouwalk exercised over the decedent is insufficient to establish undue influence.

It is the opinion of this office that the decedent's testamentary disposition of her property to certain children, while excluding her other children, is not in violation of Federal statutes pertaining to the devolution of property under Departmental jurisdiction and does not, of itself, establish a lack of testamentary capacity.

Syllabus No. 4 of the court in *In re Estate of Lacy*, 431 P.2d 366, 367 (Okla. 1967), states:

> The fact that a will is unjust or unnatural does not of itself establish testamentary incapacity, but it is a circumstance which may be considered in connection with other evidence, and which may have weight in determining the capacity of the testator; and an unnatural or unjust disposition coupled with other evidence indicating incapacity may justify a finding against the validity of the will.

It is recommended that the decedent's last will and testament dated April 17, 1978, and codicil thereto dated July 22, 1978, be approved.

/s/ Cecil O. Wood, Jr.
Field Solicitor, Pawhuska

[SEAL] **EXHIBIT "B"**

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
REGIONAL OFFICE, SOUTHWEST REGION
P.O. BOX 3156
TULSA, OKLAHOMA 74101

IN THE MATTER OF THE WILL OF MARGARET SHUNKAMOLAH, Osage Allottee, No. 71, Deceased	) Appeal From Order) of the Superin-) tendent of the) Osage Agency,) Bureau of Indian) Affairs)) Case No. IA-T-39)

DECISION ON
APPEALS FROM SUPERINTENDENT'S
ORDER APPROVING WILL

Margaret Shunkamolah, Osage Indian, Allottee No. 71, died a widow at the age of 71 (sic) on January 16, 1981. She left an estate consisting of property subject to a statutory restriction against alienation with an estimated value of $600,000.

In accordance with the provisions of Section 8 of the Act of April 18, 1912, 37 Stat. 86, 88 (1912 Act), as amended by Section 5(a) of the Act of October 21, 1978, 92 Stat. 1660, 1661 (1978 Act), and pursuant to the implementing regulations published by the Secretary of the Interior (Secretary) at 25 CFR 17.1-17.14, the Field Solicitor, Pawhuska (Field Solicitor), as the designated Special Attorney for the Osage Indians under 25 CFR 17.1(d), conducted hearings of record, on behalf of the Secretary, as to

the validity of the will of Margaret Shunkamolah dated April 17, 1978, and the codicil thereto dated July 22, 1978.[5] In accordance with 25 CFR 17.10, the Field Solicitor by memorandum dated October 22, 1982, transmitted the record of the hearings to the Superintendent, Osage Indian Agency (Superintendent). In his memorandum the Field Solicitor reviewed the record of the hearings, set forth his findings and conclusions, and recommended that the Superintendent determine the will and codicil of the Testatrix to be valid, and that he approve them for admission to probate as provided under Section 5(a) of the 1978 Act. In accordance with 25 CFR 17.12, the Superintendent on October 22, 1982, issued an *Order Approving Will* (Order). In the Order the Superintendent stated that he had reviewed the transcript of the testimony in the record of the hearings, that he had considered and accepted the findings and conclusions of the Field Solicitor, and set forth six *Findings of Fact* and six *Conclusions of Law* as the basis for his determination that the will and codicil of the Testatrix are valid, and for his decision to approve the will and codocil for admission to probate.

Following timely filing of notice of intention to appeal from the Superintendent's Order, briefs in support of the appeal were filed by counsel for Appellant Lottie A. Pratt and Appellant JoAnn Alred, daughters of the Testatrix.

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[1] Section 5(a) of the 1978 Act provides in relevant part: "Section 8 of the Act of April 18, 1912 . . . is hereby amended to read as follows: 'Any person of Osage Indian blood . . . may dispose of his Osage headright or mineral interest and the remainder of his estate . . . from which restrictions against alienation have not been removed by will executed in accordance with the laws of the State of Oklahoma: Provided, That the will of any Osage Indian shall not be admitted to probate or have any validity unless approved after the death of the testator by the Secretary of the Interior. The Secretary shall conduct a hearing as to the validity of such will at the Osage Indian Agency in Pawhuska, Oklahoma . . . The rules of evidence of the State of Oklahoma shall govern the admissability of evidence at such hearing . . . .' "

A brief in opposition to the appeals was filed by counsel for Gladys Rouwalk, daughter of the Testatrix, Margaret Cecilia Rouwalk, granddaughter of the Testatrix, and Michael Steven Pratt Toyebo, great-grandson of the Testatrix.[2]

In accordance with 25 CFR 17.14(b), the record of the hearings as to the validity of the will and codicil was transmitted to this office for my decision on the appeals, pursuant to the authority delegated by the Secretary to the Solicitor of the Department of the Interior under 209 DM 3.2A(3)(a), and by the Solicitor redelegated to the Regional Solicitor, Southwest Region (formerly Tulsa Region) under 1 SRM 1.9.1.

OPINION ON APPEALS

At the outset it is appropriate to review the testamentary scheme provided by the Testatrix for the distribution of her estate. The dispositive provisions of her will provide in substance:

To son Joseph Lee Shunkamolah, Jr.—.591966 Osage headright interest;

To daughter Gladys Belle Rouwalk—two Osage headrights;

To daughter Lottie A. Pratt—$5.00;

To daughter JoAnn Shunkamolah Alred—$5.00;

To granddaughter Margaret Cecilia Rouwalk—$5,000;

To granddaughter Ethel Carol Rouwalk—$5,000;

To grandson Cecil Frank Rouwalk—$5,000;

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[2] Counsel for Appellant Pratt thereafter submitted an *Appellate Reply Brief Of Lottie Pratt.* Appellate reply briefs are not authorized under 25 CFR 17.14(c) and cannot be filed "except by special permission." Since counsel for Appellant Pratt did not request or obtain such special permission, this brief is not a part of the record and cannot be considered.

To grandson Joseph Lee Shunkamolah—$5,000;

To grandson Fred Shunkamolah—$5,000;

To great-grandson Michael Steven Pratt Toyebo—$5,000;

To granddaughters Margaret Cecilia Rouwalk and Ethel Carol Rouwalk—equally, household and personal effects;

To grandchildren Margaret Cecilia Rouwalk, Ethel Carol Rouwalk, Cecil Frank Rouwalk—equally, one Osage headright; and

To daughter Gladys Belle Rouwalk—residue of real and personal property.

The provision of the will providing bequests to Appellant Pratt and Appellant Alred provide in their entirety:

LOTTIE A. PRATT, daughter, the sum of $5.00. The reason that I give only $5.00 to Lottie A. Pratt, is because I have heretofore in my lifetime, given her forty (40) acres, with a home thereon and improvements thereon.

Further, I have given Lottie an additional one hundred twenty (120) acres of pasture land. I supported Lottie A. Pratt, my daughter, and her three (3) Sons for 19 years; providing all of the food, utilities, cost of transportation and have given automobiles to her children, in order that they could commute from Oklahoma Military Academy and other schools to Lottie's home, and I have provided during the 19 years for numerous trips and vacations for Lottie and her three Sons, therefore, she has been well provided for during my lifetime.

JOANN SHUNKAMOLAH ALRED, daughter, the sum of $5.00. JoAnn has been given by me, for many years, help with her support, upkeep, transportation and the purchase of automobiles. JoAnn filed a lawsuit in the District Court, Osage County, against me,

> which not only defamed my reputation, but it caused me great embarrassment and humilitation [sic], and I then stopped giving her any more money. She has been hateful, mean, hostile and ugly toward me. I do not understand why she felt this way towards me, after I brought her into this life and helped her for so many years. This explains why I am only giving her $5.00 under this my Last Will and Testament.

In the opinion which follows, the appeals of Appellant Pratt and Appellant Alred are considered separately in Parts I and II.

Part I

APPEAL OF LOTTIE A. PRATT

My review of Appellant Pratt's brief on appeal discloses that under Paragraph I (The Parties And The Will And Codicil), and Paragraph II (Introduction), information is furnished which purports to trace the background and history of the procedure provided by Congress under which the Secretary of the Interior determines the validity of Osage Indian wills and approves them for admission to probate. Although Appellant Pratt provides conclusionary statements and allegations drawn from such information, no citation to supporting authority is provided. I find that for purposes of considering the issues raised by Appellant Pratt's appeal no response is required with regard to the information furnished under Paragraphs I and II of her brief, or with regard to the conclusionary statements and allegations drawn therefrom.

Under Paragraph III (Pratt Brief, p. 2) Appellant Pratt purports to support the allegation in the paragraph heading:

> The federal legislative scheme for the testate and intestate devolution of property of Osage decedents is unconstitutional.

The Department of the Interior is an agency of the executive branch of the Government and is not a proper

forum for the adjudication of questions involving the constitutionality of congressional enactments. *In re Will of Robert Warren Pitts, Unallotted Osage Indian, Deceased,* IA-T-38 (Feb. 24, 1983); *Lynn Keith,* 53 IBLA 192, 88 I.D. 369 (1981); *Oestereich v. Selective Service System Local Board No. 11,* 393 U.S. 233 (1968).

Accordingly, no finding is made with regard to Appellant Pratt's allegations under Paragraph III concerning the constitutionality of the federal statutes here involved.

Without here either addressing the issue of constitutionality raised by Appellant Pratt, or temporizing my holding that the Department of the Interior is not a proper forum for adjudicating questions regarding the constitutionality of congressional enactments, I am constrained to point out that Appellant Pratt erred in alleging under Paragraph III that "the 1978 Act did away with the trial *de novo* of such Osage wills in State Court proceedings" (Pratt Brief, p. 9). The Congressional mandate that the Secretary conduct hearings of record to determine the validity of Osage Indian wills first appears in Section 5(a) of the 1978 Act (footnote 1, *supra*), which amended Section 8 of the 1912 Act which provided:

> [A]ny adult member of the Osage Tribe of Indians . . . may dispose of any or all of his estate . . . by will, in accordance with the laws of Oklahoma: Provided, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior.

The Congressional intent evidenced by the above-quoted portion of Section 8 of the 1912 Act is clear and unambiguous. Neither the express language of Section 8, nor any necessary implication to be drawn from that language, suggests that Congress granted to Oklahoma state courts the jurisdiction to conduct *de novo* proceedings brought by will contestants seeking a review of the Secretary's decision to approve an Osage Indian will under the 1912 Act. I find, therefore, that the allegation of Appellant Pratt

in Paragraph III regarding a pre-existing right of trial *de novo* cannot be sustained.

My review of the remaining Paragraphs IV and VI in Appellant Pratt's brief (there is no Paragraph V), leads me to conclude that the gravamen of Appellant Pratt's appeal is based upon contentions which can be synthesized as follows:

> Contention 1—The will and codicil of the Testatrix were not executed in accordance with the laws of Oklahoma;
>
> Contention 2—The Testatrix was incompetent;
>
> Contention 3—The disinheritance by the Testatrix of Appellant Pratt was the result of undue influence by Gladys Rouwalk; and
>
> Contention 4—The will of the Testatrix is inequitable and should have been disapproved.

These contentions will be considered in the order set forth.

Contention 1—The Testatrix's will and codicil were not executed in accordance with the laws of Oklahoma

Under Section 5(a) of the 1978 Act Congress prescribed in particular detail the procedure to be followed by the Secretary in approving Osage Indian wills, including the requirement that the disposition be under a "will executed in accordance with the laws of Oklahoma." (footnote 1, *supra*)

Under the laws of Oklahoma "requisites" must be fulfilled to establish the validity of a will. The Oklahoma statute requires that the will be in writing; that it be subscribed at the end by the testator; that the subscription be in the presence of two attesting witnesses, each of whom must sign his name as a witness at the testator's request and in his presence; and that the testator at the time of subscribing the will declare to the attesting witnesses that the instrument is his will. 84 Okl.St.Ann. § 55. According to the evidence in the record of the hearings,

the will was signed by the Testatrix in the presence of, and witnessed by, Mark Hoefling and Father Edmond F. Byrne. The testimony of attesting witness Hoefling (Tr. pp. 60B-60C), and the testimony of Gerald E. Kamins (Tr. p. 8), who was not an attesting witness but who was present when the will was signed, establish that the Testatrix declared to the witnesses that the instrument was her will, and that she requested that Hoefling and Byrne be attesting witnesses. Although the testimony of attesting witness Father Byrne shows that he had little recollection of the events surrounding the execution of the will (Tr. pp. 68-69, 75-76), in the self-proving affidavit accompanying the will attesting witnesses Hoefling and Byrne stated under oath that the Testatrix declared the instrument being executed was her will and that she requested them to sign it as witnesses. The fact that the will is "self-proved" is significant under Oklahoma law which provides that the testimony of witnesses may be made unnecessary by a self-proving affidavit.[3]

The evidence in the record also shows that the codicil to the will was signed by the Testatrix in the presence of, and witnessed by Gerald Kamins, Caron Kamins, and Jon L. Keylor. The testimony of attesting witnesses Gerald Kamins (Tr. p. 55) and Caron Kamins (Tr. pp. 79, 87), and the self-proving affidavit attached to the codicil, establish that the Testatrix declared the document being executed was a codicil to her will and that she requested Jon L. Keylor, Gerald Kamins and Caron Kamins to sign it as witnesses.

In will contest cases involving the "requisities" which must be fulfilled to create a valid will, Oklahoma courts have consistently interpreted the statute in a reasonable and pragmatic manner, recognizing both the circumstances under which the will was executed and the wishes of the

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[3] 84 Okl.St.Ann. § 55.5: Such a [self-proved] will or testament may, at the time of its execution or at any subsequent date during the lifetime of the testator and the witnesses, be made self-proved, and the testimony of the witnesses in the probate thereof may be made unnecessary by the acknowledgment thereof by the testator and the affidavits of the attesting witnesses . . . .

testator. The Supreme Court of Oklahoma has stated in this regard:

> Substantial compliance is all that is required. (citations omitted) No formal request that the witnesses sign, or express declaration that the instrument is his will, is required. It is sufficient if the testator by words or conduct conveys to the witness the information that the instrument is his will, and that he desires them to witness it.

In re Sawyer's Estate, 202 Okla. 21 (1949).

It should be noted that under Oklahoma law "[t]he burden of proof rests upon the proponents of the will to make a *prima facie* showing entitling the will to probate. The burden shifts to the contestant to establish the issues presented by his contest." *In re Lillie's Estate*, 159 P.2d 542, 545 (Okla. 1945); *In re Estate of Wilder*, 554 P.2d 788 (Okla. 1976); *Hobbs v. Mahoney*, 478 P.2d 956 (Okla. 1970).

The record of the hearings shows that the proponents of the will and codicil presented probative evidence to establish a *prima facie* case as to the validity of the will, including the testimony of an attesting witness to the will, a witness who was present at the signing of the will, two of the three witnesses to the codicil, and the statements under oath of the witnesses to the will and codicil set forth in the self-proving affidavit attached to each instrument. Although Appellant Pratt presented arguments and interpretations bearing on Oklahoma laws in her brief, I conclude, on the balance, that such arguments and interpretations are not sufficient to impeach the probative evidence and sworn testimony presented by the proponents of the will.

I find, therefore, that Appellant Pratt failed to meet the burden of proof imposed on will contestants under Oklahoma laws; that the will and codicil of the Testatrix was executed in accordance with the laws of Oklahoma; and that Appellant Pratt's Contention 1 cannot be sustained.

Contention 2—The Testatrix was incompetent.

The record of the hearings conducted by the Field Solicitor is burdened with conflicting testimony concerning the testamentary capacity of the Testatrix. Although the testimony adduced by the contestants of the will established that the Testatrix suffered from the frailities and infirmities associated with old age, under Oklahoma case law the criteria for determining testamentary capacity does not impose a high standard of physical stamina or mental acuteness. Although testamentary capacity may be defined in various ways, Oklahoma courts have consistently held:

> A person has testamentary capacity when his mind and memory are such that he knows, in a general way, the character and extent of his property, understands his relationship to the objects of his bounty and to those who ought to be in his mind on the occasion of making a will, and comprehends the nature and effect of the testamentary act.

In re Martin's Estate, 188 P.2d 862, 864 (Okla. 1948); cited with approval *In re Estate of Lacy*, 431 P.2d 366, 368 (Okla. 1967); *In re Estate of Samochee*, 542 P.2d 498, 501 (Okla. 1975).

In considering the appeals from the decision of the Secretary approving the wills of members of other Indian tribes under statutes which parallel the approval authority granted by Congress under Section 5(a) of the 1978 Act,[4] the Interior Board of Indian Appeals has simillarly held that to invalidate an Indian will for lack of testamentary capacity, the evidence must show that the testator did not

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[4] Under 25 U.S. 373 (1976), Indians who have received allotments from the Government (not including members of the Five Civilized Tribes or Osage Indians) may dispose of their restricted property by will subject to the condition that "no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior."

know the natural objects of his bounty, the extent of his property, or the desired distribution. Mere physical impairment or a decrease in mental capability is not sufficient to support a finding of lack of testamentary capacity. *Estate of Samuel Tsoodle*, 11 IBIA 163 (1983); *Estate of Jane Eckiwaudah, a.k.a. Emma Chahsenah*, 9 IBIA 112 (1981).

In his memorandum to the Superintendent dated October 22, 1982, recommending approval of the will and codicil, the Field Solicitor provided a comprehensive review of the testimony and evidence in the record and of Oklahoma laws, and advised the Superintendent (Memorandum, p. 19):

> It is the opinion of this office that even though the record of the proceedings reflect that the decedent was subject to advanced age, senility, confusion, hallucinations, and ill health, these conditions are insufficient to deny approval of said will, if the testator possesses testamentary capacity. This office is of the further opinion that the preponderance of the evidence reveals that the decedent possessed testamentary capacity in that she knew the objects of her bounty and the extent of her property.

In his Order the Superintendent noted that he, too, had "reviewed the record and written transcription of the testimony herein and considered the recommendations of the special attorney." With regard to the testamentary capacity of the Testatrix, the Superintendent stated in his third Conclusion of Law:

> That the preponderance of the evidence establishes that at the time of the execution of the purported will and codicil, decedent, in a general way, understood and knew the nature and situation of her property, the relation in which she stood to those persons who might naturally have some claim to her bounty, and the effect and consequences of her act on these persons.

The findings and recommendation of the Field Solicitor, the substance of which was adopted by the Superintendent,

are based upon probative evidence in the record and must be given great weight. The Field Solicitor, as hearing officer conducting the hearings as to the validity of the Testatrix's will, was in a position to hear testimony, and to observe the demeanor and appraise the credibility of the witnesses. A hearing officer's conclusions concerning controverted questions of fact ordinarily will not be disturbed on appeal. *In re Will of Robert Warren Pitts, Unallotted Osage Indian*, IA-T-38 (Feb. 24, 1983); *Estate of Ammon Pubigee*, IA-859 (1966); *Estate of Effie Kushinwy (Cushingway)*, IA-1347 (1966); *Estate of Ko-Tay (Stephen)*, IA-48 (1951). Where testimony is conflicting, the factual findings of the hearing officer will not be disturbed on appeal because he had the opportunity to observe and hear the witnesses. *Estate of Hiemstennie (Maggie) Whiz Abbott*, 4 IBIA 12, 82 I.D. 169 (1975). The decision by a hearing officer to accept one of two conflicting conclusions, each of which was established by testimony received, will not be disturbed when the decision was based on observation of the demeanor of the witnesses. *Estate of Grace Akeen, a.k.a. Grace Akins*, 10 IBIA 14 (1982). It should be noted that it is not necessary that the Field Solicitor or the Superintendent answer every argument made and analyze each item of evidence introduced during the hearing. *Seacoast Anti-Pollution League v. Costle*, 597 F.2d 306 (1st Cir. 1979); *Kenworth Trucks of Philadelphia, Inc. v. NLRB*, 580 F.2d 55 (3rd Cir. 1978).

I find, therefore, that under the laws of Oklahoma the Testatrix was mentally competent at the time she executed her will and codicil, and that Appellant Pratt's Contention 2 cannot be sustained.

Contention 3—The disinheritance by the Testatrix of Appellant Pratt was the result of undue influence of Gladys Rouwalk.

The contention of undue influence by Appellant Pratt is premised on the fact that during the last years of her life the Testatrix resided in the home of, and was cared for by, her daughter Gladys Rouwalk, sister of Appellant Pratt and Appellant Alred. In this circumstance there can be

no doubt but that the mother and daughter in many ways exercised an influence on each other in the ordinary affairs of life, but this fact standing alone neither gives rise to a presumption of undue influence, nor justifies an inference to that effect. The point at which influence becomes "undue" for testamentary purposes and, as a matter of law, sufficient to nullify an otherwise valid will has been described by the Oklahoma Supreme Court:

> Undue influence, such as will invalidate a will, must be something which destroys the free agency of the testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator. It is not sufficient that the testator was influenced by the beneficiaries in the ordinary affairs of life, or that he was surrounded by them and in confidential relations with them at the time of its execution.

In re Cook's Estate, 175 P. 507 (Okla. 1918); *In re Lillie's Estate, supra; Hubbell v. Houston*, 441 P.2d 1010 (Okla. 1968).

It is noted that in considering appeals from the decision of the Secretary approving wills of members of other Indian tribes under statutes which parallel the approval authority granted by Congress under the 1978 Act (footnote 4, *supra*), the Interior Board of Indian Appeals has held, consistent with the holding by the Supreme Court of Oklahoma, that four elements must be established to support a finding of undue influence in the disapproval of an Indian will: that the testator was susceptible to influence; that a person was capable of influencing the testator's mind and actions; that the testator was acting under the influence of another at the time of the testamentary act; and that the testamentary disposition was contrary to the testator's wishes. *Estate of Samuel Tsoodle, supra; Estate of Asmakt Yumpquitat (Millie Sampson)*, 8 IBIA 1 (1980); *Estate of Hiemstennie (Maggie) Whiz Abbot, supra.*

My review of the provisions of the will reveals that the Testatrix conceived a rational scheme for the testamentary

disposition of her property, providing bequests even to the third generation of her descendants. She demonstrated uncommon providence—not improvidence as alleged by Appellant Pratt—by providing a lucid justification of the bequests about which she anticipated questions would be raised. That the Testatrix fully comprehented the ramification of her testamentary scheme, and that she was unrelenting in her determination to preserve the scheme, is established by probative evidence in the record including, in particular, the testimony of banker D. J. Stuart who was appointed conservator for the Testatrix in 1976, and served in that capacity until the death of the Testatrix in 1981. Relevant portions of Stuart's testimony have been extracted from the transcript of the hearings and are provided in *Appendix A*, attached hereto.

The Field Solicitor in his memorandum of October 22, 1982, advised the Superintendent that, in his opinion, "the evidence relative to the influence and control that Mrs. Rouwalk exercised over the decedent is insufficient to establish undue influence" (Memorandum, p. 21). This finding was accepted by the Superintendent in the Order in his fourth *Conclusions of Law:*

> That the preponderance of the evidence establishes that the purported will and codicil were not executed as a result of fraud, duress, or undue influence practiced upon the decedent.

I find, therefore, that the record of the proceedings conducted by the Field Solicitor does not contain sufficient probative evidence of undue influence to invalidate the will and codicil, and that Appellant Pratt's Contention 3 cannot be sustained.

Contention 4—The will of the Testatrix is inequitable and should have been disapproved.

The contention that the will of the Testatrix is inequitable is premised on the fact that, as a practical matter, Appellant Pratt was disinherited by the Testatrix in her will which provided a bequest of $5.00 from an estate with an

estimated value of $600,000. In her brief Appellant Pratt presents an extended discussion and argument concerning this contention and makes the allegation (Pratt Brief, p. 29):

> [T]he Department [of the Interior] is to protect the heirs against the testamentary improvidence of the decedent, as shown here, and against the overreaching of the decedent by any person which results in whole or in part in the disinheritance of an Osage heir.

Appellant Pratt provided no citation to statute, regulation or other authority in support of this allegation. My review of the provisions of the 1912 Act, the 1978 Act, and the legislative history of these Acts, as well as the available case law, fails to disclose any support for the contention that the Secretary is authorized to disapprove a will which is valid under Oklahoma laws, and which reflects a rational scheme for the testamentary disposition of property, in order to protect the interests of an Osage Indian heir against disinheritance by a competent testator.

Under Section 5(a) of the 1978 Act Congress granted to Osage Indians the testamentary power to dispose of property which is restricted against alienation, subject only to the condition that their wills be found valid under Oklahoma laws and approved by the Secretary (footnote 1, *supra*). I can perceive of no statutory language, or interpretation of such language, which suggests that in granting power to Osage Indians to make testamentary disposition of restricted property, Congress intended at the same time to emasculate that power by granting to the Secretary discretionary power to thwart such disposition on a subjective basis.

The United States Supreme Court has considered the scope of the Secretary's authority to approve wills made by members of other Indian tribes under a statute which, not unlike Section 5(a) of the 1978 Act, requires Secretarial approval (footnote 4, *supra*). In a case involving the estate of a Comanche Indian whose will had been disapproved by the Secretary, the Court stated:

> Whatever may be the scope of the Secretary's power to grant or withhold approval of a will under 25 U.S.C. 373, we perceive nothing in the statute or its history or purpose that vests in a governmental official the power to revoke or rewrite a will that reflects a rational testamentary scheme with a provision for a relative who befriended the testator and the omission of one who did not, simply because of a subjective feeling that the disposition of the estate was not "just and equitable." The Regional Solicitor's action was based on nothing more that we can discern than his concept of equity and in our view this was not the kind or degree of discretion vested in him.

Tooahnippah v. Hickel, 397 U.S. 598, 609-610 (1970).

The decisions of the Interior Board of Indian Appeals comport with the foregoing. The authority of the Secretary to approve or disapprove a will does not permit the disapproval of a technically valid will that evidences a rational testamentary scheme, no matter how inequitable that disposition may appear to an outsider. *Estate of Helen Ward Willey*, 11 IBIA 43 (1983).

I find, therefore, that the will of the Testatrix reflects a rational testamentary scheme for the disposition of her property, and that Appellant Pratt's Contention 4, that the will should have been disapproved because of the inequity resulting from her disinheritance by the bequest of $5.00, cannot be sustained.

Part II

APPEAL OF JOANN ALRED

Appellant Alred in her brief on appeal contends that the Superintendent erred in approving the will and codicil of the Testatrix, alleging under Proposition I (Alred Brief, p. 3):

> The purported will and codicil of Margaret Shunkamolah was drafted on instructions of a person stand-

> ing in a confidential relationship with the decedent with no opportunity for independent advice from a person in a position to advise impartially and confidentially, and should therefore be disapproved because of undue influence.

Analysis of the foregoing allegation by Appellant Alred reveals that it consists of two contentions: first, that the will and codicil were "drafted on instructions of a person standing in a confidential relationship" with the Testatrix; and second, that the Testatrix had "no opportunity for independent advise from a person in a position to advise impartially and confidentially." Neither contention is supported by evidence in the record.

It is clear from Appellant Alred's brief that the "person" referred to in the first contention is Gladys Rouwalk, the daughter of the Testatrix, and sister of Appellants Pratt and Alred. In her brief Appellant Alred states that the "issue is whether the relationship between the proponent, Gladys Rouwalk, and the decedent, Margaret Shunkamolah, was such as to demand a finding of 'confidential relationship', thereby imposing a presumption of undue influence and causing the burden of proof to shift on this issue from contestants to proponents" (Alred Brief, p. 4). There is no evidence or testimony in the record which suggests that the will and codicil were drafted on the instruction of Gladys Rouwalk or, for that matter, that she was present when the provisions of the will and codicil were discussed with the Testatrix. To the contrary, the uncontroverted testimony of attorney Gerald Kamins establishes that he prepared the will and codicil at the instructions of the Testatrix, that he acted more or less as a scrivener and wrote in the will what the Testatrix told him, and, moreover, that Gladys Rouwalk was not present during his conferences with the Testatrix. Relevant portions of Kamins' testimony have been extracted from the transcript of the hearings and are provided in *Appendix B* attached hereto.

With regard to the "confidential relationship" referred to by Appellant Alred, note has been already taken that during the last years of her life the Testatrix resided in the home of, and was cared for by, her daughter Gladys Rouwalk, and that in this circumstance there can be no doubt but that the mother and daughter in many ways exercised an influence on each other in the ordinary affairs of life (p. 9, *supra*). It is likely that the mother and daughter during these years developed a "confidential relationship", particularly since the care extended by the daughter to her mother must have pleased the Testatrix as indicated by the evidence in the record that, from time to time, she presented gifts to the daughter. The care and attention shown the Testatrix in her declining years by her daughter does not, in itself, constitute the exercise of undue influence. The Supreme Court of Oklahoma has stated in this connection:

> Kindness and attention shown the testator by the principal beneficiary who was a blood relative are not *per se* the exertion of 'undue influence.' The word 'undue' when used to qualify 'influence,' has a legal meaning of 'wrongful' so that 'undue influence' necessary to invalidate a will means wrongful influence, but influence acquired through kindness, affection or attention is not wrongful. Huff, Oklahoma Probate Law and Practice, Sec. 112.

Hubbell v. Houston, *supra*, at p. 1018.

Appellant Alred further contends (Alred Brief, p. 5) that the Superintendent erred in approving the will of the Testatrix in that he "failed to address the issue of whether the relationship existing between the proponent and the alleged testatrix was such as to cause said relationship to be categorized as 'confidential', thereby involking the rule of presumption of undue influence as restated in *White v. Palmer*, 498 P.2d 1401 (Okla. 1972)."

Appellant Alred notes that the rule of presumption of undue influence in *White* was adopted by this office in the decision on appeal in *Estate of Cyril Dewey Bockius, De-*

ceased Osage Allottee No. 2106, IA-T-26 (July 19, 1973), and in support of her contention quotes a portion of the holding in *White*:

> When the legal presumption of undue influence has arisen by showing confidential relations, whether in dispositions of property inter vivos or by will, the burden of proof is upon the party seeking to take the benefit of such disposition to rebut the presumption attaching thereto by showing either a severance of the confidential relations, or that the party making the disposition had competent and independent advice in regard thereto. *Hunter v. Battiest, supra.* Independent advice has been held to mean that the testator had the benefit of conferring fully and privately about the consequences of his intended will with a person who was not only competent on such matters, but who was so disassociated from the interest of the beneficiary named there as to be in a position to advise with the testator impartially and confidentially. *Anderson v. Davis*, 208 Okl. 477, 256 P.2d 1099.

White v. Palmer, supra, at p. 1406.

Under the above-quoted holding in *White*, the court in effect ruled that the proponents of a will bear the burden of rebutting the legal presumption of undue influence based upon a confidential relation by showing that the testator "had competent and independent advice", and "that the testator had the benefit of conferring fully and privately about the consequences of his intended will with a person who was not only competent on such matters, but who was so disassociated from the interest of the beneficiary named there as to be in a position to advise with the testator impartially and confidentially." The transcript of the hearings conducted by the Field Solicitor clearly shows that the proponents of the will fulfilled the evidentiary standards enunciated in *White* to rebut the presumption of undue influence.

D. J. Stuart, the Pawhuska banker who served as conservator for the Testatrix from 1976 until her death in 1981, was

called as a witness during the hearings by counsel for Gladys Rouwalk, devisee and executrix under the will. Even if it is assumed *arguendo* that an untoward "confidential relationship" existed between the Testatrix and Gladys Rouwalk, the significance of that relationship under the rule in *White* is more than mitigated by the uncontroverted testimony of Stuart which shows that to the end of her days, physical infirmities and confidential relationship notwithstanding, the Testatrix retained a clear understanding of her scheme for the testamentary disposition of her property and, during private conferences with Stuart, that she was adamant in her refusal to consider any changes in that scheme. If the relationship which existed between the Testatrix and Gladys Rouwalk serves to raise the specter of undue influence, that specter is laid to rest by the testimony of Stuart under the rule in *White*. The accuracy of this conclusion is buttressed by the extracts from the testimony of Stuart set forth in the attached *Appendix A*.

In connection with the foregoing, it is noted that the substance of the contentions and arguments submitted by Appellant Alred with regard to the undue influence purportedly exercised by Gladys Rouwalk parallel those submitted by Appellant Pratt. The contentions and arguments submitted by Appellant Pratt have been considered and citation to authority provided in Part I of this opinion (p. 8, *supra*), and such consideration and citation apply with equal vigor to the contentions and arguments relating to undue influence submitted by Appellant Alred.

I find, therefore, that the record of the proceedings conducted by the Field Solicitor does not contain probative evidence of a confidential relationship between the Testatrix and Gladys Rouwalk to support a presumption of undue influence; that a presumption of undue influence, if any, was rebutted by probative evidence in the record adduced by the proponent of the will; and that the allegation of undue influence by Appellant Alred in her brief cannot be sustained.

DECISION ON APPEALS

For the reasons and findings set forth, I hereby affirm the *Order Approving Will* of Margaret Shunkamolah, Osage Allottee, No. 71, issued by the Superintendent, Osage Agency, on October 22, 1982, and deny the appeal of Lottie A. Pratt, and the appeal of JoAnn Shunkamolah Alred.

/s/ Raymond F. Sanford
Regional Solicitor

July 27, 1983

APPENDIX—A

IN THE MATTER OF THE WILL OF MARGARET SHUNKAMOLAH DECISION ON APPEALS FROM SUPERINTENDENT'S ORDER APPROVING WILL

Witness D. J. Stuart—extracts of testimony during hearings conducted by the Field Solicitor, Pawhuska—Transcript pp. 304-307.

Q. When did you first become acquainted with Margaret Shunkamolah?

A. In 1971, right after joining the First National.

Q. How did you happen to become acquainted with Margaret Shunkamolah?

A. Uh, in granting her credit, as far as a loan was concerned.

. . . .

Q. How often would she come into the bank in 1971?

A. She would come in, probably, about three times in a quarter.

Q. Who handled her business or other accounts, when she come into the bank?

A. I did.

Q. Do you know whether she requested any person to handle her business?

A. No, she would always wait for me. At times, even during Indian payment, she might wait for two hours, but she would always talk with me, she wouldn't talk with anyone else in the bank. We hit it off very well, just to start off with, so she always waited for me.

. . . .

Q. When were you appointed as her conservator?

A. Uh, November, I believe, of '76, I believe it's November of '76.

Q. It's November of '76. And do you know who has served as her conservator until her death?

A. I served as her conservator from that time, until her death.

Q. Can you tell the court if you've had any conferences with Mrs. Shunkamolah, with reference to her making a will?

A. Yes, I did.

Q. When did these conferences commence?

A. They started approximately a month or two after I became her conservator. I found out that she did not have a will, and I felt that it was my responsibility, as her conservator, that I recommend that she do get a will, at that time. And she indicated that she would do that.

Q. Where did this conference take place?

A. At the place, in the First National Bank.

Q. Where in the bank, if you recall?

A. Uh, that happened, uh, in our computer room.

Q. Who was present?

A. There was no one present other than she and I.

Q. Do you recall what time of day it may have been?

A. Uh, when I talked to her the first time, she had come into the bank about, concerning a will, it was about three o'clock in the afternoon. And our staff had already left, and she was there until, approximately, 5:30 or 6:00.

Q. Did you have any other conferences with her after that, with reference to her making a will?

A. Yes, I did.

. . . .

Q. Please tell the court when you had other conversations, following the first conversation, with Mrs. Shunkamolah with reference to her will, and where you had those conversations, what persons were present and approximately when you had them.

A. Okay, uh, I first, after I had talked to her the first time, I did talk to her, we were in the bank. I had asked her if she had done anything on her will, and she indicated to me, yes, that she had, uh, and told me that she had talked to you about it, and uh, then I had discussed with you some of the things in the will. We were running into some problems, as to who she wanted to leave monies to.

Q. Did she indicate to you how she wanted to leave her property?

A. Yes, she did.

Q. What did she tell you?

A. She indicated to me that she wanted to leave the property to certain individuals, those individuals—

Q. Would you please specify those?

A. Those being, Gladys Rouwalk, Margaret Rouwalk, Carol Rouwalk, Joe Shunkamolah, uh, let's see, there was a Michael Pratt, she had indicated to me

that Michael had always been her favorite grandson, and she wanted to make sure and leave him money. And she'd indicated to me, that was because she virtually raised the boy. There was uh, let's see, I'm trying to think if there were any others. I believe that was it.

Q. When did this conversation take place?

A. This took place, approximately, in uh, this was in the latter part of '77. It'd been around eight or nine months, I believe, since I had first suggested she make a will.

. . . .

Q. And who was present besides you and Mrs. Shunkamolah, if any?

A. There were just the two of us present. Gladys Rouwalk had dropped her by the bank building, and we had discussed her will, she did want to discuss it with me, and she brought me a copy of the will. I saw what was on the will. It was apparent to me at that time that the will would be contested. Gladys, at various intervals, had come back by the bank, you know, to see if she was completed with her business. And, you know, two or three times, she was not, and Gladys went on and left and did some shopping or something, I don't know.

. . . .

Q. What did she have to say to you, with reference to her children?

A. Well, she told me that, uh, first of all, I'd tried to get to her to change the will, because I knew it was going to (sic) contested, that she needed to leave all of her children something. And she was very adamant about not doing so. I recommended

to her, a number of times, to make some changes, and why she needed to make the changes.

Q. What changes did you recommend that she make?

A. Well, I recommended that she give all of her children, all of her daughters and sons, leave them something in the will. She would not do it. She was mad about several things. She was very upset, first of all that this conservatorship was ever set up.

. . . .

Q. Just please tell the court what Mrs. Shunkamolah said to you, in her words, as best as you recall?

A. She told me, when I told her that she needed to make some changes on the will, she said no, she did not want to do that, she said they were mean to me, she said they embarrassed me, she said she didn't like what they had done to her, and she said, no, she would not do it. And so, she told me that she didn't like, as far as Joe was concerned, she said Joe, she said she's been giving him money all his life. That she wanted him to have some initiative and go out and do some things himself. She said she put him through school, she'd bought him several cars, and she said she's already given him alot. She told me that Lottie, that she'd given Lottie a house and had given Lottie land. And she said she sold the land, and she sold the house, and spent the money. She told me that she had bought groceries for practically all of them all of their lives, and provided their living. She was mainly mad at JoAnn because of the deal on the conservatorship. She said that she had raised their children, paid for their education, bought their children cars, and that was the main things that she said to me. That was the reason she didn't want to leave these people anything. So, we had some other business

at that time to take care of, concerning she wanted to buy some furniture, and—

. . . .

Q. Okay, you won't be able to testify as to what Mr. Kamins told you. Did you ever see a copy of the will Mr. Kamins prepared?

A. Yes, I did.

Q. How did you happen to see a copy of the will that he prepared?

A. Mr. Kamins mailed it to me.

Q. Did you ever discuss that will with Mrs. Shunkamolah?

A. Yes, I did.

Q. When did you discuss it with her?

A. Uh, right after I received the will, that she wanted me to keep in safe keeping for her, I still made recommendations to her that she needed to change that, that the will would be contested and that she needed to do something. She was still very adamant and indicated to me that it was going to stay the way it was.

. . . .

APPENDIX—B

IN THE MATTER OF THE WILL OF MARGARET SHUNKAMOLAH DECISION ON APPEALS FROM SUPERINTENDENT'S ORDER APPROVING WILL

Witness Gerald Kamins—extracts of testimony during hearings conducted by the Field Solicitor, Pawhuska—Transcript pp. 5-12.

Q. Are you engaged in a private practice of law?

A. Yes.

Q. Where do you live?

A. In Tulsa, Oklahoma.

. . . .

Q. Did you know Margaret Shunkamolah?

A. Yes, I did.

Q. When did you first meet Margaret Shunkamolah?

A. I met Margaret Shunkamolah during a period of around 1972 through '73, '74. I was general counsel for the Pawnee Indian Tribe, and her son-in-law was a Pawnee and during that period was on the business committee of the tribe.

Q. Did you have an occasion to see Margaret Shunkamolah on various occasions?

A. Yes. I would see her mainly at the, either tribal meetings or dinners, pow-wows, and what have you at different times.

Q. Did you have an opportunity to converse with her during those meetings?

A. Yes.

Q. Would you, how would you describe your relationship during '72 or '73 with Margaret Shunkamolah?

A. Well, mainly, of course she was the elder of the family that I had met. Cecil Rouwalk, she was his mother-in-law, and it was more social and, as you see families. It was cordial and I didn't speak to her in any great detail, just, we acknowledged each other. I think the first time I visited with her any length of time was in 1975, early '75, at Stillwater.

Q. How did your relationship with Margaret Shunkamolah progress?

A. Well, I think, the reason I say that, at that time there was a dance over there, a benefit dance at

Stillwater, and she acknowledged and knew that I was representing certain individuals at that time and doing some Indian Law work, and she spoke to me, that sometime she would like to visit with me.

Q. Did you in fact visit with her?

A. Yes, I did.

Q. When was that?

A. Uh, later, well I saw her at different times, but the first conferences that I had directly with her in regards to anything but social work that pertained to business was either late '77 or early '78.

MR. SHOEMAKE: May it please the court, we would point out that Mr. Kamins was not a witness to the will, but is a witness to the codicil. We suggest that perhaps it might be proper to proceed first with the will, since it's necessary to establish the will itself.

MR. PAYNE: That's what I intend to do, Your Honor. If I may see it, I'd like to introduce it, and ask that it be marked as Exhibit No. 1.

(The last will and testament of Margaret Shunkamolah dated April 17, 1978, marked as Exhibit No. 1)

Q. Mr. Kamins, I'll hand you what has been marked for identification purposes a document labeled Exhibit 1. If you would please, examine that document and tell the court what it is.

A. (Mr. Kamins examines the will.) This is the last will and testament of Margaret Shunkamolah that I prepared, and also presented to her when she executed the will.

Q. Is it dated?

A. Yes.

Q. What date appears thereon?

A. 17th of April.

Q. And you testified sir that you prepared that document, is that correct?

A. That's correct.

Q. From what source of information did you prepare Exhibit No. 1?

A. Well, I had talked with her before the, what they call the Annual Pow Wow in '77—

Q. Did she express—

A. I met her there and she had some notes and things that I talked with her about. I made some notes. And then, either at that time or a little bit later I received a proposed will and a suggested will that you had prepared and I took that and the notes and then I met with her in the spring of '78 and reviewed that and went over it, and from that I prepared the will.

Q. You prepared the will?

A. This one right here.

Q. Is that the first draft of the will you prepared sir, from Mrs. Shunkamolah?

A. The will that you prepared, what I did I took and I worked off of that, and when I talked with her I explained to her that she would have to give some explanation as to why she was only making certain allowances for two of her children.

Q. What two children do you have reference to?

A. JoAnn Alred and Lottie Pratt.

Q. Did she tell you why she was providing as she did in Exhibit No. 1 for those children?

A. Yes, that's correct.

Q. Are those the reasons set out in Exhibit No. 1?

A. That's correct.

Q. Were there any additional reasons that she communicated to you besides those set out in Exhibit 1?

A. Well, there were other reasons, but I asked her mainly as to how she had provided for them in her lifetime.

Q. Did she tell you?

A. Yes, and this was what she told me she had done for them.

Q. So, it's your testimony then that you prepared Exhibit No. 1 from notes that you had made from conferring with Margaret Shukamolah and from your private conferences with Margaret Shunkamolah, and from a previous draft of a will prepared by myself. Is that correct?

A. That is correct.

Q. Did you review Exhibit No. 1 with Margaret Shunkamolah prior to the execution by her?

A. Yes.

Q. When was that?

A. On the day she executed the will I, she and I met in her bedroom and spent about 30 or 40 minutes going through the will.

Q. Now, the will bears the date of—

A. April 17th.

Q. Was that the date that you visited with her?

A. Yes.

Q. And where was that conference?

A. In her, her bedroom, in the home that she was residing in at that time, in Hominy, Mrs. Rouwalk's home, 501 So. Pettit, I believe, is the address.

Q. Who was present at the time you reviewed the will with Mrs. Shunkamolah?

A. No one was present. I reviewed it with her privately.

Q. You said that was in a bedroom?

A. Yes.

Q. Was anyone else in the house?

A. Uh, in the house, in the dining room area, was Father Edmond Byrne, who at that time was a priest in Tulsa; and Mark Hoefling; Marilyn Holland was my secretary; and in the living room and in the kitchen area was Gladys Rouwalk and her daughter, Margaret.

Q. How long had you been at Mrs. Shunkamolah's home before you and she retired to the bedroom to discuss the will?

A. Well, it wasn't long after we were there, I would say within, oh, 15 minutes or so after exchange of introductions and just general, just talk. My secretary visited with her a little bit while we were talking.

Q. Did you and Father Byrne and Mark Hoefling and Marilyn arrive in the same vehicle?

A. Yes, we all came up together.

Q. Did the other persons you've mentioned in addition to yourself visit with Mrs. Shunkamolah before you and she retired to the bedroom?

A. Yes.

Q. After you and she discussed the will at the bedroom, what, what transpired?

A. We came to the dining room and at that time I had her take a seat at the dining room table.

Q. Back to the bedroom, did you and she discuss the will in the bedroom, that's your testimony?

A. Yes, that's correct.

Q. What did she have to say about the will at that time?

A. I went over the wording of the reasons that she had limited her gifts to her two daughters and she already had seen your proposed will as to the distribution, We discussed that and I told her that if this was her intention, and she said it was, this was how she wanted it done, she was very emphatic; And I said well, we'll have to go out and this will have to be signed and the witnesses will have to view you signing the will, do you understand that? And she acknowledged that she did.

Q. O.K., did—

A. I also told her at the same time, I said, then this will will have to be sent up to the Agency to be approved. And I asked her if she understood that and she did.

Q. Did she read the will in your presence?

A. I read the will to her. She had cataracts and her vision was not good, and uh, but I did go over the wording because, besides the wording, the will is basically the same as the will that she had seen that you had prepared, the proposed will.

Q. Did she indicate any other things to you about her desires with reference to the disposition of her property, other than—

A. No, everything that is in here was the way that she said she wanted it done, and so I told her if this was what she wanted, this is the way the will is, and I told her the next step would be to sign it.

Q. And was that done?

A. Yes, it was.

Q. Would you please describe the steps you followed?

A. When we got to the dining room I just asked her if she'd be seated, and Marilyn was sitting off to the side, Holland, who is the notary, and Father Byrne was standing by next to her, and I think Mark was either sitting next to, or standing next to Marilyn Holland. We were all in a group around the dining room table.

Q. Was anyone present besides yourself, Marilyn, Mark and Father Byrne?

A. Uh, Gladys put some chairs up, and then I asked her to either go into the living room or into the kitchen, and she did.

Q. So, was anyone else besides—

A. No, that was the only group around the table there.

Q. What next transpired?

A. I then handed her the will, Exhibit A, and asked her if she understood what this document was, and she said yes, it was her will. I asked her if I reviewed this and discussed it with her in the bedroom, and she acknowledged that I had. I asked her if this was her last will and she has properly expressed how she wanted her estate to be divided upon her death, and she acknowledged that she did. I said, "Do you know what these people are for?" And she said, "To see me sign," or words to that affect. And I said, "Yes, they are witnesses of you signing." And then she proceeded to sign.

Q. Where did she sign?

A. On page 5.

Q. O.K. Is that her signature?

A. Yes, that's her signature, yes.

Q. Was that done by her own hand?

A. That's done by her own hand.

Q. Was that done in your presence and in the presence—

A. My presence and all the witnesses.

Q. O.K. What next happened?

A. Uh, after she signed, then Father Bryne, I asked him to step up and to sign, which he did on page 6.

Q. Is that Edmund Byrne?

A. Edmund F. Byrne. And then Mark Hoefling signed after Father Byrne. And observing this was Marilyn Holland, who then notorized on page 7. And then, since I had a self-proving provision, I had the, Margaret Shunkamolah sign again on page 7.

Q. Did Father Byrne and Mark—

A. In fact, let me correct this, she, when she signed, she signed page 5 and then she went over and signed page 7. As the witnesses came up they signed on page 5 and 7 in sequence.

Q. Was that done in the presence, or did the witnesses sign in the presence of Margaret Shunkamolah?

A. Yes.

Q. And in the presence of each other?

A. Yes, they did.

Q. And did she sign in both of their presence?

A. Yes.

Q. And then you said Marilyn Holland served as a notary?

A. Yes.

Q. Was she there during all of this transaction?

A. Yes.

Q. Did she sign?

A. Yes.

Q. And affixed her notary seal thereto?

A. Yes, that's correct.

Q. What transpired after that on April 17, 1978?

A. After Marilyn signed the will, then Marilyn had the file folder and if I recall she put the will in and then Marilyn was talking with Mrs. Shunkamolah and they were talking about cooking or sewing, or something, what women talk about. We stood there and visited a little bit, and then I would say that within 15 minutes or so, we departed.

Q. Where was the will kept since that time?

A. The will was brought to my office and then it was mailed to the Solicitor, and the Solicitor then sent me a letter saying that there were some technical, there were three main technical problems with the will. And when I looked that over, I informed Margaret Shunkalomah I was going to have to make some changes based upon Mr. Wood's recommendation, she said, "Is that Mr. Wood from the Agency?" I said, "Yes." She said, "Well, if he recommended it, then fine."

. . . .

Q. What did you do after you received the letter from Mr. Wood?

A. I informed Mrs. Shunkamolah that the will that had been signed and executed in April would have to have some slight changes and I explained to her what those were; that we didn't have to have any provision for her great-grandson, for any kind

of trusteeship or anything, that the Agency would take care of that and I, and the exact fraction of the headright interest that was going to her son, I didn't have that properly in the will, and they corrected that. And then the other thing was that there was a, some individual cash gifts that maybe could not be honored those gifts and that she could just drop those and omit those since those grandchildren were being taken care of in a division of a headright.

Q. Did she indicate a desire to execute a codicil?

A. Yes.

Q. Or to change her will?

A. Her response was mainly that, when I told her who had told me this, that Mr. Wood at the Solicitor's office, and her acknowledgement was, "Is it Mr. Wood at the Agency?", and I said, "Yes", and she said, "Well, that's what you're to do." She said, "Just fix it up or prepare it."

Q. I'll hand you what has been marked for identification purposes as Exhibit No. 3. If you would sir, examine that document and tell the court what it is.

(Kamins looks at codicil)

A. This is the first amendment, or first codicil to Margaret Shunkamolah's will, and it was signed and executed on July 22, 1978.

Q. Who prepared that document?

A. I did.

Q. And when did you discuss this will, if you did, I mean this codicil after you prepared it, with Mrs. Shunkamolah?

A. On the 22nd of July, my wife and myself and Marilyn went up to, excuse me, I'm sorry, Marilyn, I mean March Lyles, Marilyn at that time was not

working for me, went up to Hominy. I called ahead of time and said I had the amendment ready, the first codicil. And visited with her and went over the corrections that were suggested by Mr. Wood and I told her that this did not take the place of her will but it was a change and it would then be accepted by the Agency.

Q. Where did you discuss the codicil with Mrs. Shunkamolah?

A. I discussed it with her in the dining room. She and I were in the dining room at the end of the table.

Q. Were any of the other persons that you mentioned present?

A. No, they were in the living room.

Q. Were any other persons present besides you?

A. No, there was nobody present when I discussed it with her. And she understood that this the—

MR. SHOEMAKE: Now, Your Honor, we would appreciate it if counsel would state what she said, not what she understood.

Q. Do you recall her exact langauge?

A. As I best recall, she said, "Is this what Mr. Wood wants?" And I said, "Yes, this will take care of what his suggestions were." And she said, "Okay." And then I called the witnesses in and she signed it.

Q. Did she indicate whether that was her desire also?

. . . .

A. Anyway, when I explained to her, read to her the changes, her response was would this satisfy, or meet the suggested changes by Mr. Wood, I said it would, then she said then that's what I want to do, or something like that and she would sign it.

Q. O.K. Did she affix her signature on Exhibit No. 3?

A. Yes, she did.

Q. Who was present at the time she did that? What was said or done?

A. I asked her what it was and she said it was the changes to her will. And I asked her if I had explained it to her and she said that I had. And I said now I want you to sign that and she said that she would and I told her what people that were standing there were going to do.

Q. Who was standing there?

A. My wife was there.

Q. What is her name?

A. Caron Kamins. And I introduced, when we first came in she met Marcy Lyles who was my secretary at the time, and I told her that, you know, we would witness the will, and then there was another gentleman that I asked to come along, Mr. Kaylor, Jon Kaylor.

Q. Was he present?

A. Yes.

Q. Were all of these people present in addition to yourself?

A. That is correct.

Q. Margaret Shunkamolah affixed her signature to Exhibit 3?

A. That is correct.

Q. Where did she sign Exhibit 3?

A. On the dining room table.

Q. And—

A. It appears on page 3 of the will.

Q. Was it done in your presence and in the presence of the other witnesses?

A. That is correct.

Q. Did she sign, did Margaret Shunkamolah sign any other parts of Exhibit 3?

A. Yes, she also signed on page 5.

Q. Did the witnesses thereafter sign?

A. Yes, they did.

Q. And who are they, please?

A. Jon Kaylor, Caron Kamins, and Gerald Kamins, myself.

Q. And did you have a notary present on this day?

A. Yes.

Q. Who was that?

A. Marcy Lyles.

Q. Did she sign?

A. Yeah, she signed and notorized on page 5.

Q. I believe you testified sir but I'll ask again, if all signatures were done in the presence of each other and in the presence, if the witnesses signed in the presence of each other, and in the presence of the testator, or testatrix signed?

A. Yes, they all observed Mrs. Shunkamolah signing and observed each other signing and witnessing.

. . . .

Q. Based upon your conversations with Mrs. Shunkamolah on July 22, 1978, and on April 17, 1978, and your previous conversations, your conversations previous to April 17, 1978, were you able to form an opinion as to her competency to execute a will?

A. Yes, she had testamentary capacity.

Q. And what do you mean by your statement, that she had testamentary capacity?

A. She knew what her estate was and how she wanted it to be divided upon her death.

. . . .

EXHIBIT "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOANN ALRED AND LOTTIE PRATT,	)	
Plaintiffs,	)	
vs.	)	No. 83-C-729-E
JACK SHOEMATE, Superintendent of the Osage Indian Agency, et al.,	)	
Defendant.	)	

JUDGMENT

(Filed November 27, 1986)

This action came on for hearing before the Court, Honorable James O. Ellison, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that the decision of the Secretary be and hereby is affirmed, and that Defendants be awarded costs of action.

DATED at Tulsa, Oklahoma this 25th day of November, 1985.

/s/ James O. Ellison
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOANN ALRED AND LOTTIE PRATT,	)	
Appellants,	)	
vs.	)	No. 83-C-729-E
JACK SHOEMATE, Superintendent of the Osage Indian Agency, et al.,	)	
Appellees.	)	

MEMORANDUM OPINION

(Filed November 27, 1985)

The Court has for determination an appeal from a decision of the Secretary of the Interior approving the decision of the Superintendent Osage Agency Bureau of Indian Affairs, Pawhuska, Oklahoma determining as valid a will and codicil of a deceased Osage Indian, Margaret Shunkamolah.

The appeal is made on the record pursuant to act of Congress of October 21, 1978, 92 Stat. 1660 together with other appropriate law and delegations of authority.

The standard of review by this Court is strictly limited to that established by the Congressional enactment which provides that the decisions of the Secretary shall be binding and shall not be reversed unless against the clear weight of evidence or erroneous in law.

The voluminous record, pleadings, and briefs in this case show contestants of the will and codicil attack the decision of the superintendent upon the following grounds:

1. That the 1978 Act is unconstitutional.
2. That the testator was without testamentary capacity.
3. That the principal beneficiary of the will and codicil, exercised undue influence.
4. That the Secretary has a responsibility to protect the heirs of the testatrix.
5. That the Secretary erred in placing the burden of proving the will invalid upon the contestants of the will.

This appeal was commenced in this Court by Appellants Lottie A. Pratt and JoAnn Alred, daughters of Margaret Shunkamolah, deceased, on August 25, 1983, seeking to reverse the order of the Superintendent of the Osage Agency Bureau of Indian Affairs and the decision on appeal of the Regional Solicitor of the Southwest Region approving the will dated April 17, 1978 and the codicil thereto dated July 22, 1978 of Margaret Shunkamolah, Osage Allottee number 71, deceased; or in the alternative to have the cases remanded to the Department of the Interior for an administrative decision pursuant to the Court's instructions.

The named appellees are Jack Shoemate, Superintendent Osage Agency, Bureau of Indian Affairs; William P. Clark, Secretary of the Interior; Joseph Lee Shunkamolah, Jr., Gladys Belle Rouwalk, Margaret Cecilia Rouwalk, Cecil Frank Rouwalk, Joseph Lee Shunkamolah, Fred Shunkamolah, Michael Steven Toyebo, and Ethel Carol Rouwalk, legatees and devisees of the testatrix.

Testatrix Margaret Shunkamolah died testate on January 16, 1981, a resident of Osage County, Oklahoma who was 87 years of age at the time of her death. Testatrix left an estate consisting of a 3.59166 interest in an Osage headright valued at $690,891.78 and $115,722.08 in cash which are subject to the supervision of the Osage Agency, Bureau of Indian Affairs. The contested will devised the property of the Testatrix as follows:

> To son Joseph Lee Shunkamolah, Jr.—.59166 Osage headright interest;
>
> To daughter Gladys Belle Rouwalk—two Osage headrights;
>
> To daughter Lottie A. Pratt—$5.00
>
> To daughter JoAnn Shunkamolah Alred—$5.00
>
> To granddaughter Margaret Cecilia Rouwalk—$5,000
>
> To granddaughter Ethel Carol Rouwalk—$5,000
>
> To grandson Cecil Frank Rouwalk—$5,000
>
> To grandson Joseph Lee Shunkamolah—$5,000
>
> To grandson Fred Shunkamolah—$5,000
>
> To great-grandson Michael Steven Pratt Toyebo—$5,000
>
> To granddaughters Margaret Cecilia Rouwalk and Ethel Carol Rouwalk—equally, household and personal effects
>
> To grandchildren Margaret Cecilia Rouwalk, Ethel Carol Rouwalk, Cecil Frank Rouwalk—equally one Osage headright; and
>
> To daughter Gladys Belle Rouwalk—residue of real and personal property.
>
> LOTTIE A. PRATT, daughter, the sum of $5.00. The reasons that I give only $5.00 to Lottie Pratt is because I have heretofore in my lifetime, given her forty (40)

acres, with a home thereon and improvements thereon. Further I have given Lottie an additional one hundred twenty (120) acres of pasture land. I supported Lottie A. Pratt, my daughter, and her three (3) sons for 19 years; providing all of the food, utilities, cost of transportation and have given automobiles to her children, in order that they could commute from Oklahoma Military Academy and other schools to Lottie's home, and I have provided during the 19 years for numerous trips and vacations for Lottie and her three sons, therefore, she has been well provided for during my lifetime.

JoANN SHUNKAMOLAH ALRED, daughter, the sum of $5.00. JoAnn has been given by me, for many years, help with her support, upkeep, transportation and the purchase of automobiles. JoAnn filed a lawsuit in the District Court, Osage County, against me, which not only defamed my reputation, but it caused me great embarrassment and humiliation, and I then stopped giving her any more money. She has been hateful, mean, hostile and ugly toward me. I do not understand why she felt this way toward me, after I brought her into this life and helped her for so many years. This explains why I am only giving her $5.00 under this my Last Will and Testament.

The Field Solicitor, Pawhuska Field Office, as the designated Special Attorney for the Osage Indians conducted hearings of record as to the validity of the will and the codicil. These hearings were pursuant to the provisions of § 8 of the Act of April 18, 1912, 37 Stat. 86, 88, as amended by § 5a of the Act of October 21, 1978, 92 Stat. 1660, 1661, and pursuant to regulations implementing such Act published by the Secretary of the Interior at 25 C.F.R. §§ 17.1-17.14.

The Field Solicitor by his memorandum of October 22, 1982 transmitted the record of the hearings to the Super-

intendent. Findings and Conclusions were set forth in the memorandum and recommendations were made to the Superintendent that the Superintendent determine the testatrix will and codicil to be valid and approve them for admission to probate.

The Superintendent on October 22, 1982 issued an order approving will. This order accepted the Findings and Conclusions of the Field Solicitor and determined that the will and codicil of Margaret Shunkamolah were valid and were approved for admission to probate. Thereafter Lottie A. Pratt and JoAnn Alred filed timely appeals from the Superintendent's order. The record was transmitted to the regional solicitor for his decision pursuant to the authority delegated by the Secretary of the Interior to the Solicitor of the Department of the Interior and redelegated by the Solicitor to the Regional Solicitor. The Regional Solicitor on July 27, 1983 issued his decision which affirmed the Superintendent's order and approved the will and codicil of the testatrix. Motions for reconsideration were urged by appellants which were denied by the Regional Solicitor whereupon this action was commenced in this Court on August 25, 1983.

CONSTITUTIONALITY

Appellants question the constitutionality of the congressional acts which constitute a scheme for the devolution of property by Osage Indian citizens. It is argued that these statutes are violative of the 5th, 9th, 10th and 14th amendments; that they are based on race, and are in violation of the Civil Rights Act. An additional allegation of unconstitutionality is based upon the alleged failure of the 1978 act to define appellate remedies.

In view of the special relationship between the federal government and restricted Indians, our highest court has long recognized congressional authority to regulate the probate of restricted Indian estates, and has sanctioned the requirement that the Secretary approve the will of an Indian owning restricted property before it has validity. *Blanset v. Cardin*, 256 U.S. 319 (1921). The Supreme Court has upheld the constitutionality of legislation regulating such probates so long as the regulation is tied rationally to the fulfillment of the special relationship and obligation congress has toward restricted Indians. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977); *Morton v. Mancari*, 417 U.S. 535 (1974). Congress has regulated the administration of restricted estates of deceased Osage Indians by a series of enactments beginning with the act of June 28, 1906, 34 Stat. 539, and culminating with the legislation of October 21, 1978, 92 Stat. 1660, now under attack. Between these dates, Congress addressed the administration of restricted Osage Indian estates by providing that wills of adult members of the Osage tribe not mentally incompetent would be recognized in accordance with the laws of the State of Oklahoma with a specific proviso that no such will would be admitted to probate or be valid unless approved before or after the death of the testator by the Secretary of the Interior. Act of April 18, 1912, 37 Stat. 86.

The 1978 act grants the Secretary authority to conduct a hearing regarding the validity of Osage Indian wills. Section 5a of the act requires that the Secretary must determine that the will was "executed in accordance with the laws of the State of Oklahoma." This section provides that the rules of evidence of the State of Okla-

homa shall govern issues of admissibility of evidence, and the Secretary is granted the same subpoena power as vested in courts. A consideration of all of these statutes clearly establishes Congressional intent to conserve and protect the restricted property of Osage Indians. These statutes, including the 1978 statute at issue in this appeal, meet the constitutional standards required b ythe Supreme Court of the United States in *Weeks* and *Mancari*.

Appellants further argue that the Osage Indian testamentary legislation is violative of the 9th and 10th amendments, which appears to be an argument that the State of Oklahoma has exclusive jurisdiction over the probate of Osage Indian estates. Under the doctrine of federal preemption, where federal regulation is comprehensive, state jurisdiction is preempted by the operation of federal law, and the Supremacy Clause of the United States Constitution prevents the state from asserting jurisdiction in the area. *New Mexico v. Mescalero Tribe*, — U.S. —, 103 S.Ct. 2378 (1983); *Worcester v. Georgia*, 31 U.S. 515 (6 Pet. 1832). The constitutionality of the 1978 act is challenged by Appellants by the allegation that it fails to define an appellate remedy. The Act read together with statutes governing federal civil procedure provides sufficient information for perfecting an appeal in the United States District Court from the Secretary's decision. Appellants' allegations challenging the constitutionality of the statutes comprising the Osage Indian testamentary legislation fail to support a finding that this legislation is unconstitutional.

ISSUE OF TESTAMENTARY CAPACITY

The limitations of this Court's standard of review cannot allow the Court to second-guess the evidentiary judgment of the Field Solicitor. Even if the appellate court would not agree with the findings of the Field Solicitor it would be error to reverse such findings unless his decision was against the clear weight of the evidence or erroneous in law. Section 5(a) of the 1978 Act establishes in detail the procedures to be followed in approving Osage Indian wills, including the requirement that the testamentary disposition be under a "will executed in accordance with the laws of Oklahoma". Oklahoma law requires that certain "requisites" must be fulfilled to establish the validity of a will. It must be in writing; it must be subscribed at the end by the testator; the subscription must be in the presence of two attesting witnesses, each of whom must sign his name as a witness at the testator's request and in his presence; and testator at the time of subscribing a will must declare to the attesting witnesses that the instrument is his will. 84 O.S. § 55.

Oklahoma courts have interpreted 84 O.S. § 55 consistently in requiring only substantial compliance. The Supreme Court in the case of *In re Sawyer's Estate,* 209 P.2d 864 (Okla. 1949) held that substantial compliance is all that is required . . . no formal request that the witness sign, or express declaration that the instrument is his will, is required. It is sufficient if the testator by words or conduct conveys to the witness information that the instrument is his will, and that he desires them to witness it.

Under Oklahoma law the burden of proof rests upon the proponents of the will to make a *prima facie* showing entitling the will to probate. The contestant has the burden of establishing the issues presented by the contest. *In re Lillie's Estate,* 159 P.2d 542 (Okla. 1945).

The holdings of *Tooahnippah v. Hickel,* 397 U.S. 598, (1970) in construing the provisions of 25 U.S.C. § 372 does not change the applicability of Oklahoma law to § 5(a) of the 1978 Act which requires that the testamentary disposition be under a "will executed in accordance with the laws of Oklahoma."

Both the memorandum of the Field Solicitor and the decision of the Regional Solicitor correctly apply laws of the State of Oklahoma in regard to the admission of evidence, burden of proof, and execution and attestation of the will and codicil of the testatrix. Appellants have not met the burden established by the standard of review by this Court.

Although conflicting testimony was produced at the hearings conducted by the Field Examiner this Court cannot find that the determination of the Field Examiner was against the clear weight of evidence on the issue of testamentary capacity.

ISSUE OF UNDUE INFLUENCE

During the last years of her life, testatrix lived in the home of and was cared for by her daughter Gladys Rouwalk who is the primary beneficiary under the will. The evidence further points to efforts by Gladys Rouwalk to isolate the testatrix from contact with appellants. Gladys Rouwalk and her mother, the testatrix, did have a "con-

fidential'' relationship in that there was evidence that she was being influenced by Gladys in the ordinary affairs of life and lived in close proximity to her. This type of relationship, however, does not in and of itself constitute undue influence. The Supreme Court of Oklahoma has described it as follows: Undue influence, such as will invalidate a will, must be something which destroys the free agency of the testator at the time when the instrument is made, and which, in effect, substitutes the will of another for that of the testator. It is not sufficient that the testatrix was influenced by the beneficiaries in the ordinary affairs of life, or that she was surrounded by them and in confidential relations with them at the time of its execution. In cases wherein a legal presumption of undue influence arises, the presumption may be rebutted by showing the that (sic) testatrix had competent and independent advice with regard to her will and codicil. *Anderson v. Davis,* 208 Okla. 477, 256 P.2d 1099 (1959); *White v. Palmer,* 498 P.2d 1401 (Okla. 1971). The Field Solicitor and the Regional Solicitor placed great weight on the testimony of banker D. J. Stuart who was conservator for the testatrix from 1976 to the time of her death in 1981. His testimony, together with the provisions of the will establish that the testatrix had a rational scheme for the disposition of her property and that she understood that scheme. Stuart was in a position to advise her impartially and confidentially, which he did. This Court cannot, based upon the record below and the standard of review, find that the decision was against the clear weight of evidence or erroneous in law on the issue of undue influence.

ISSUE OF RESPONSIBILITY OF SECRETARY TO HEIRS OF TESTATRIX

This issue must be considered in light of appellant's reading of *Tooahnippah*. In that case the United States Supreme Court was addressing the issue of whether the Secretary of the Interior's approval or disapproval of a will disposing of restricted Indian property is subject to judicial review in a federal court, and whether his action in disapproving the will in that case was not a valid exercise of the authority vested in him by 25 U.S.C. § 373. Appellants rely upon the separate concurring opinion of Justice Harlan wherein at page 619 it states:

> In summary, I think the statutory framework and legislative history of § 373 do indicate that the Secretary of Interior is not foreclosed from going beyond the technical requirements in deciding whether to approve a will. A will that disinherits the natural object of the testator's bounty should be scrutinized closely. If such a will was the result of overreaching by a beneficiary, or fraud; if the will is inconsistent with the decedent's existing legal obligation of support, or in some other way clearly offends a similar public policy; or if the disinheritance can be fairly said to be the product of inadvertance—which might be the case if the testator married or became a parent after the will was executed—the Secretary might properly disapprove it. However I do not think the Secretary can withhold approval simply because he concludes it was unfair of the testator to disinherit a legal heir in circumstances whereas here there is a perfectly understandable and rational basis for the testator's decision.

397 U.S. at 619.

This decision dealing with non-Osage Indians, if applicable and analogous to the 1978 Osage Act, does no more

than require a careful consideration of the evidence in the type of case enumerated above. This decision does not change the burden of proof in a contested will case nor does it give the Secretary the right to deny a will because he feels it is unfair to an Indian heir. In fact, the holding in *Tooahnippah* specifically prohibits the Secretary from exercising his independent judgment as to the fairness of the will provisions. This Court finds that the decision of the Secretary is not against the clear weight of the evidence and is not erroneous in law. The decision is affirmed.

November 26, 1985

/s/ James O. Ellison
UNITED STATES
DISTRICT JUDGE

EXHIBIT "D"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LOTTIE PRATT and JOANN ALRED,	)	
Plaintiff-Appellants,	)	Nos. 85-2870 and 85-2926
v.	)	(D.C. No. 83-C-729-E)
JACK SHOEMATE, Superintendent of Osage Indian Agency, *et al.*,	)	(N.D. Okla.)
Defendant-Appellees.	)	

ORDER AND JUDGMENT

(Filed Nov. 21, 1986)

Before McKAY, SEYMOUR, and ANDERSON, Circuit Judges.

Will contestants Lottie Pratt and JoAnn Alred appeal a district court decision upholding the Interior Department's approval of the will and codicil of their mother, Margaret Shunkamolah, a full-blood Osage Indian who died on January 16, 1981. They also contend by motion that the Interior Department should be eliminated as a

party to this appeal. We deny the motion, and we affirm the district court.

With little or no explanation, contestants argue that federal regulation of the administration of restricted Indian estates is unconstitutional. *See* Act of Oct. 21, 1978, Pub. L. No. 95-496, § 5, 92 Stat. 1660, 1661 ("1978 Act"). We disagree. The district court correctly noted that the Supreme Court "has long recognized congressional authority to regulate the probate of restricted Indian estates." Rec., vol. I, Memorandum Opinion, at 6. In *Bigheart v. Pappan*, 482 F.2d 1066 (10th Cir. 1973), *cert. denied*, 416 U.S. 937 (1974), we recognized a line of cases establishing "[t]hat Congress can regulate as to inheritance of restricted Indian properties." *Id.* at 1068. We agree with the district court's conclusion that contestants' allegations "fail to support a finding that this legislation is unconstitutional." Rec., vol. I, Memorandum Opinion, at 8.

We also reject contestants' argument that section 5(a) of the 1978 Act is unconstitutionally vague. Contestants maintain that section 5(a) repealed prior federal adoption of Oklahoma law for determining Osage will validity, and preserved only Oklahoma statutory requirements for will execution formalities. After reviewing the legislative history of section 5(a) of the 1978 Act, amending the Act of April 18, 1912, Pub. L. No. 62-125, § 8, 37 Stat. 86, 88 ("1912 Act"), we conclude that contestants' argument is without merit. *See* H.R. Rep. No. 1459, 95th Cong., 2d Sess. 4 (1978); S. Rep. No. 1157, 95th Cong., 2d Sess. 7 (1978).

Contestants further contend that special federally-created presumptions and burdens of proof favoring Indian heirs preempt Oklahoma common law in regard to will execution and testamentary capacity. We find no evidence in the 1978 Act language of the legislative history that Congress intended to supplement the Oklahoma standards adopted in section 5(a) with special "heir-protective" presumptions. Nor does *Tooahnippah v. Hickel*, 397 U.S. 598 (1970), dictate such a result. When Congress passed the 1912 Act to permit Osage wills, it favored freedom of testation. In the present case, in which all devises were made to descendants of the testatrix, we have no reason to believe that Congress did not consider Oklahoma statutory and common law fully adequate for determining the validity of the will.

Contestants challenge the Interior Department's findings that the testatrix possessed testamentary capacity, that the will was properly executed, and that the testatrix was not subjected to "undue influence." These findings "shall not be reversed unless . . . against the clear weight of the evidence or erroneous in law." 1978 Act, § 5(a), 92 Stat. 1662. The district court upheld the Department's findings. Although contestants point to evidence that may conflict with the Department's findings, the record does not justify a conclusion that any of these findings were against the clear weight of the evidence.

AFFIRMED.

Entered for the Court
Stephanie K. Seymour
Circuit Judge

EXHIBIT "E"

JANUARY TERM—February 4, 1987

Before Honorable Monroe G. McKay, Honorable Stephanie K. Seymour, and Honorable Stephen H. Anderson, Circuit Judges

LOTTIE A. PRATT,	)	
	)	
Plaintiff-Appellant,	)	
	)	
JOAN ALRED,	)	
	)	
Plaintiff-Appellant,	)	Nos. 85-2870
	)	and 85-2926
vs.	)	
	)	
JACK SHOEMATE,	)	
Superintendent of the Osage	)	
Indian Agency, et al.,	)	
	)	
Defendants-Appellees.	)	

This matter comes on for consideration of appellants' motion to vacate this court's January 27, 1987, order denying recall of the mandate in the captioned cases.

Through clerical error, appellants' petition for rehearing filed December 19, 1986, was treated as untimely, although the time for filing the petition for rehearing had been extended to December 20, 1986.

Upon consideration whereof, the court vacates its January 27, 1987, order.

The court further orders as follows:

1. The mandate issued to the United States District Court for the Northern District of Oklahoma is recalled;

2. Appellants' petition for rehearing is denied.

3. The mandate in these cases is reissued forthwith.

/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

EXHIBIT "F"

(1) Section 6 of the Act of June 28, 1906, 34 Stat. 539 c. 3 reads:

> "That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage Tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband and wife, in which case said lands, moneys and mineral interests must go to the mother and father equally."

(2) Section 8 of the Act of April 18, 1912, 37 Stat. 86, c. 83 reads:

> "That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to the alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: Provided, that no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

(3) Section 7 of the Act of February 27, 1925, 43 Stat. 1008, c. 359, reads:

> "Hereafter none but heirs of Indian blood shall inherit from those who are of one-half or more Indian blood of the Osage Tribe of Indians any right, title or interest to any rested lands, moneys, or mineral interests of the Osage Tribe: Provided, that this section shall not apply to spouses under existing marriages."

(4) Section 5 of the 1978 Act states in part that:

> "Section 8 of the Act of April 18, 1912 (37 Stat. 86, 88) is hereby amended to read as follows; "Any person of Osage Indian blood, eighteen years of age or older, may dispose of his Osage headright or mineral interest and the remainder of his estate (real, personal, and mixed, including trust funds) from which restrictions against alienation have not been removed by will execution in accordance with the laws of the State of Oklahoma: Provided, That the will of any Osage Indian shall not be admitted to probate or have any validity unless approved after the death of the testator by the Secretary of the Interior."

(5) Section 2 of the Act of June 25, 1910, 36 Stat. 856, as amended by the Act of February 14, 1913, 37 Stat. 678, 25 USC Section 373, provides in pertinent part:

> "Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator . . . Provided also, That this section and section 372 of this title shall not apply to the Five Civilized Tribes or the Osage Indians."

86 1761

Supreme Court, U.S.
FILED
JUN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LOTTIE PRATT AND JOANN ALRED,

Petitioners,

v.

JACK SHOEMATE, SUPERINTENDENT OF THE OSAGE INDIAN AGENCY; JAMES WATT, SECRETARY OF THE INTERIOR; JOSEPH LEE SHUNKAMOLAH, JR.; GLADYS BELLE ROUWALK; MARGARET CECILIA ROUWALK; CECIL FRANK ROUWALK; JOSEPH LEE SHUNKAMOLAH; MICHAEL STEVEN PRATT TOYEBO AND ETHEL CAROL ROUWALK, LEGATEES, DEVISEES AND HEIRS OF THE DECEDENT, MARGARET SHUNKAMOLAH,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS, GLADYS BELLE ROUWALK, MARGARET CECILIA ROUWALK, CECIL FRANK ROUWALK, ETHEL CAROL ROUWALK AND MICHAEL STEVEN PRATT TOYEBO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 2, 1987

QUESTION PRESENTED FOR REVIEW

Respondents submit that the only valid question presented for review by Petitioners to this Court is whether the United States Court of Appeals for the Tenth Circuit decided the present case in a way in conflict with the decision of this Court in *Tooahnippah v. Hickel*, 397 U.S. 598 (1970).

Petitioners' *Question Presented* (Petition for Writ of Certiorari at (i)) is otherwise contrary to and in violation of Supreme Court Rules 21.1(a) and 34.6.

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Respondents.

BRIEF OF NON-GOVERNMENTAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

By this brief, the following non-governmental Respondents, Gladys Belle Rouwalk, Margaret Cecilia Rouwalk, Cecil Frank Rouwalk, Ethel Carol Rouwalk and Michael Steven Pratt Toyebo (hereinafter collectively referred to as "Respondents"), submit their opposition to the Petition for Writ of Certiorari filed herein by the Petitioners, Lottie Pratt and JoAnn Alred (hereinafter collectively referred to as the "Petitioners").

STATEMENT OF THE CASE

Under Supreme Court Rule 34.2, these Respondents take exception to the *Statement of the Case* set forth in Petitioners' Petition for Writ of Certiorari (Petition for Writ of Certiorari at pps. 3-17)[1], and hereby submit their own statement of the case before the Court.[2]

The Court has for determination a Petition for Writ of Certiorari from a decision of the United States Court of Appeals for the Tenth Circuit, affirming the decisions of (i) the United States District Court for the Northern District of Oklahoma, (ii) the United States Department of Interior, Regional Solicitor's Office, Southwest Region, and (iii) the Superintendent of the Osage Agency, Bureau of Indian Affairs. Petitioners contest the testate disposition of the estate of Margaret Shunkamolah, a full blood Osage Indian.

Margaret Shunkamolah, Osage Allottee No. 71 (hereinafter referred to as the "Testatrix"), died testate on January 16, 1981, a resident of Osage County, Oklahoma and seized of substantial restricted property, consisting primarily of a 3.59166 interest in an Osage headright, valued at $690,891.78, and $115,722.08 in cash. The devolution of the described estate of the Testatrix was subject to the supervision of the Osage Agency, Bureau of Indian Affairs. The Last Will and Testament of the Testatrix, dated April 17, 1978, and the Codicil

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[1] Consistent with Petitioners' erroneous appellate procedures at each stage of the appellate review of this case, Petitioners' *Statement of the Case* (Petition for Writ of Certiorari, pps. 3-17) is argumentative and is in essence Petitioners' *Arguments* to the Court in support of their Petition for Writ of Certiorari.

[2] Unless otherwise designated, these Respondents shall make reference to those documents attached as an Appendix to Petitioners' Writ for Petition of Certiorari, *e.g.* (Petitioners' Appendix, p.).

thereto, dated July 22, 1978 (hereinafter referred to as the "Will" and "Codicil") were filed for approval with the Osage Agency, Bureau of Indian Affairs. The Will, as modified by the Codicil, devised the property of the Testatrix as follows:

> To son Joseph Lee Shunkamolah, Jr. — .59166 Osage headright interest;
>
> To daughter Gladys Belle Rouwalk — two (2) Osage headrights;
>
> To daughter Lottie A. Pratt — $5.00;
>
> To daughter JoAnn Shunkamolah Alred — $5.00;
>
> To granddaughter Margaret Cecilia Rouwalk — $5,000;
>
> To granddaughter Ethel Carol Rouwalk — $5,000;
>
> To grandson Cecil Frank Rouwalk — $5,000;
>
> To grandson Joseph Lee Shunkamolah — $5,000;
>
> To grandson Fred Shunkamolah — $5,000;
>
> To great-grandson Michael Steven Pratt Toyebo — $5,000;
>
> To granddaughters Margaret Cecilia Rouwalk and Ethel Carol Rouwalk — equally, household and personal effects;
>
> To grandchildren Margaret Cecilia Rouwalk, Ethel Carol Rouwalk, Cecil Frank Rouwalk — equally one (1) Osage headright; and
>
> To daughter Gladys Belle Rouwalk — residue of real and personal property.
>
> LOTTIE A. PRATT, daughter, the sum of $5.00. The reasons that I give only $5.00 to Lottie Pratt is because I have heretofore in my lifetime, given her forty (40) acres, with a home thereon and improvements thereon.

Further, I have given Lottie an additional one hundred twenty (120) acres of pasture land. I supported Lottie A. Pratt, my daughter, and her three (3) sons for 19 years; providing all of the food, utilities, cost of transportation and have given automobiles to her children, in order that they could commute from Oklahoma Military Academy and other schools to Lottie's home, and I have provided during the 19 years for numerous trips and vacations for Lottie and her three sons, therefore, she has been well provided for during my lifetime.

JoANN SHUNKAMOLAH ALRED, daughter, the sum of $5.00. JoAnn has been given by me, for many years, help with her support, upkeep, transportation and the purchase of automobiles. JoAnn filed a lawsuit in the District Court, Osage County, against me, which not only defamed my reputation, but it caused me great embarrassment and humiliation, and I then stopped giving her any more money. She has been hateful, mean, hostile and ugly toward me. I do not understand why she felt this way toward me, after I brought her into this life and helped her for so many years. This explains why I am only giving her $5.00 under this my Last Will and Testament. (Petitioners' Appendix, pps. 76-77)

On the basis of the division of property as set forth above, approval of the Will and Codicil thereto was contested by the Petitioners.

On March 17, 1981, the Field Solicitor, Pawhuska Field Office, as the designated Special Attorney for the Osage Agency, Bureau of Indian Affairs (hereinafter referred to as the "Field Solicitor"), conducted hearings of record as to the validity of the Will and Codicil thereto. These hearings were pursuant to the provisions of Section 8 of the Act of April 18, 1912, 37 Stat. 86, 88, as amended by Section 5(a) of the Act of

October 21, 1978, 92 Stat. 1660, 1661 (hereinafter referred to, unless specifically cited, as the "Act of 1912", the "Act of 1978", or collectively as the "Osage Acts") and pursuant to regulations implementing the Osage Acts published by the Secretary of the Interior at 25 C.F.R. §§ 17.1-17.14.

Following several days of hearings on the record, the Field Solicitor by his memorandum of October 22, 1982 transmitted the record of the hearings to the Superintendent of the Osage Agency, Bureau of Indian Affairs (hereinafter referred to as the "Superintendent"). Findings and Conclusions were set forth in the memorandum and recommendations were made that the Superintendent determine the Testatrix' Will and Codicil to be valid and approve them for admission to probate.

By Order dated October 22, 1982, the Superintendent approved the Will and Codicil of the Testatrix. (Petitioners' Appendix pps. 1-32) Upon appeal by Petitioners of the Superintendent's decision to the United States Department of Interior, the record was transmitted to the Regional Solicitor, Southwest Region, for his review and decision pursuant to authority delegated by the Secretary of the Interior to the Solicitor of the Department of Interior and redelegated by the Solicitor to the Regional Solicitor (hereinafter the "Regional Solicitor").

In his decision of July 27, 1983, the Regional Solicitor found, *inter alia*, on behalf of the Secretary of Interior as follows:

(a) that the Will and Codicil thereto were executed in accordance with the laws of Oklahoma;

(b) that under the laws of Oklahoma, the Testatrix was mentally competent at the time she executed the Will and Codicil;

(c) that the record of hearings did not contain sufficient probative evidence of undue influence to invalidate the Will and Codicil; and

(d) that the Will reflected a rational testamentary scheme for the disposition of the Testatrix' property. (Petitioners' Appendix, pps. 33-53)

Accordingly, the decision of the Regional Solicitor affirmed the Order of the Superintendent approving the Will and Codicil for submission to probate thereof. Motions for reconsideration were urged by Petitioners, which were denied by the Regional Solicitor.

Thereafter, on August 25, 1983 the Petitioners filed their appeal from the decision of the Secretary of Interior with the United States District Court for the Northern District of Oklahoma, pursuant to the provisions of the Act of 1978.

Following an exhaustive review of the voluminous record, pleadings and briefs in the case, United States District Court Judge, James O. Ellison, determined by Memorandum Opinion dated November 27, 1985:

(a) that the Petitioners' [referred to as "Contestants" below] allegations challenging the federal statutes comprising the Osage Indian testamentary legislation failed to support a finding that such legislation is unconstitutional;

(b) that the findings of the Department of Interior that (i) the Testatrix had sufficient testamentary capacity, (ii) the Will and Codicil were executed in accordance with Oklahoma law, and (iii) the Will and Codicil were not the products of undue influence were not against the clear weight of evidence or erroneous in law; and

(c) that the decision of the United States Supreme Court in *Tooahnippah v. Hickel, infra,* does not change the burden

of proof in a contested will case, nor give the Secretary of Interior the right to deny a Will on the basis of inequity or unfairness to an Indian heir. (Petitioners' Appendix, pps. 73-85).

Judgment was entered by the United States District Court for the Northern District of Oklahoma on November 27, 1985, affirming the decisions of the Department of Interior. Petitioners filed their Notice of Appeal to the United States Court of Appeals for the Tenth Circuit on December 13, 1985 and December 23, 1985 respectively.

Following the submission of written briefs and subsequent oral arguments on November 17, 1986, the United States Court of Appeals for the Tenth Circuit, in affirming the decision of the United States District Court for the Northern District of Oklahoma, found:

(a) that federal legislation (i.e. the Osage Acts) regulating the administration of restricted Indian estates is constitutional, and in particular, that Section 5(a) of the Act of 1978 was not unconstitutionally vague;

(b) that the decision of the Supreme Court of the United States in *Tooahnippah v. Hickel, infra,* did not require that Oklahoma common law in regard to will execution and testamentary capacity be supplemented with special "heir-protective" presumptions; and

(c) that neither the decision of the United States District Court for the Northern District of Oklahoma, nor the findings of the United States Department of Interior were against the clear weight of the evidence or erroneous in law. (Petitioners' Appendix, pps. 86-88)

Thereafter, the United States Court of Appeals for the Tenth Circuit, by an Order dated February 4, 1987, denied Petitioners' Petition for Rehearing and issued its mandate to the

United States District Court for the Northern District of Oklahoma. (Petitioners' Appendix, pps. 89-90) Petitioners have filed on or about April 29, 1987 their Petition for Writ of Certiorari before this Court.

SUMMARY OF RESPONDENTS' ARGUMENTS

This Court in *Tooahnippah v. Hickel,* 397 U.S. 598 (1970) provided that (i) an administrative decision of the Secretary of Interior regarding the testate devolution of Indian property is subject to judicial review by the federal courts, and (ii) the Secretary of Interior was not vested with power to revoke or rewrite a will which reflected a rational testamentary scheme based upon that governmental official's concept of equity.

The decisions of the United States Court of Appeals for the Tenth Circuit, as well as the United States District Court for the Northern District of Oklahoma were correct in their scope of judicial review of this case, and were neither inconsistent nor contrary to the holdings of this Court in *Tooahnippah v. Hickel, supra.*

RESPONDENTS' ARGUMENTS

Initially, these Respondents would submit that the arguments of Petitioners set forth under subsections B, C and D of Petitioners' *Statement of the Case* (Petition for Writ of Certiorari, pps. 8-17)[3] are erroneous and outside the proper question presented to this Court, inasmuch as said subsections attempt

[3] Petitioners' Petition for Writ of Certiorari does not contain a direct and concise argument section amplifying the reasons relied on for allowance of the writ, as specified by Supreme Court Rule 21.1(j), but rather all arguments are presented in Petitioners' *Statement of the Case.* (Petition for Writ of Certiorari, pps. 3-17)

to address issues of clear weight of evidence and Oklahoma common law concerning execution of wills.

Subsection A of Petitioners' *Statement of the Case* (Petition for Writ of Certiorari, pps. 3-8) attempts to frame the only appealable issue of the purported conflict between the decision of the United States Court of Appeals for the Tenth Circuit in this case and the decision of this Court in *Tooahnippah v. Hickel, supra.* Petitioners propound that *Tooahnippah, supra* created special "heir-protective" presumptions in such Indian will cases, which upon application according to Petitioners would not only allow the Secretary of Interior to disapprove a will based upon his own subjective concepts of equity but actually *require* the Secretary of Interior to disapprove a will whose dispositive provisions are in any manner contrary to the devolution of the estate under intestate succession, regardless of the existence of a rational testamentary scheme to the will. (Petition for Writ of Certiorari, pps. 4-8)

In order to advance their argument, Petitioners have looked not to the majority opinion of the *Tooahnippah* Court, but rather have extracted isolated phrases from Justice Harlan's separate concurring opinion therein (397 U.S. at 611-619). In doing so, Petitioners have taken liberties with such concurring opinion and attempted to create a stare decisis effect to their interpretation thereof.[4]

The unreported opinions of both The United States District Court for the Northern District of Oklahoma and the United States Court of Appeals for the Tenth Circuit addressed the application of *Tooahnippah v. Hickel, supra,* to the case at hand, and in particular Petitioners' reliance upon the separate

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[4] It has long been established that "concurring opinions" have no legal effect and are in no way binding upon any court. *Alaska v. Troy,* 258 U.S. 101 (1922), and its progeny.

concurring opinion of Justice Harlan. (Petitioners' Appendix, pps. 74-88)

In his Memorandum Opinion dated November 26, 1986, District Court Judge, James O. Ellison opined:

> "This decision [*Tooahnippah, citation omitted*] dealing with non-Osage Indians, if applicable and analogous to the 1978 Osage Act, does no more than require a careful consideration of the evidence in the type of case enumerated above. This decision does not change the burden of proof in a contested will case nor does it give the Secretary [of Interior] the right to deny a will because he feels it is unfair to an Indian heir. In fact, the holding in *Tooahnippah* specifically prohibits the Secretary from exercising his independent judgment as to the fairness of the will provision. This Court finds that the decision of the Secretary is not against the clear weight of the evidence and is not erroneous in law. The decision is affirmed." (Petitioners' Appendix pps. 84-85)

Likewise, Circuit Court Judge, Stephanie K. Seymour, writing for the three-judge panel assigned by the United States Court of Appeals for the Tenth Circuit to this case, stated in the Order and Judgment filed November 21, 1986:

> "Contestants [Petitioners herein] further contend that special federally-created presumptions and burdens of proof favoring Indian heirs preempt Oklahoma common law in regard to will execution and testamentary capacity. We find no evidence in the 1978 Act language or the legislative history that Congress intended to supplement the Oklahoma standards adopted in Section 5(a) with special 'heir-protective' presumptions. Nor does *Tooahnippah v. Hickel* [*citation omitted*] dictate such a result. When Congress passed the 1912 Act to permit Osage wills, it favored freedom of testation. In the present case, in which all devises were made

to descendants of the testatrix, we have no reason to believe that Congress did not consider Oklahoma statutory and common law fully adequate for determining the validity of the will." (Petitioners' Appendix, p. 88)

These Respondents submit that the rational testamentary scheme of the Will and Codicil, especially the dispositive provisions thereof as to the Petitioners, is consistent with the ruling of the *Tooahnippah* Court, wherein at page 610 it states in pertinent part:

"Whatever may be the scope of the Secretary's power to grant or withhold approval of a will under 25 U.S.C. § 373, we perceive nothing in the statute or its history or purpose that vests in a governmental official the power to revoke or rewrite a will that reflects a rational testamentary scheme with a provision for a relative who befriended the testator and omission of one who did not, simply because of a subjective feeling that the disposition of the estate was not 'just and equitable' . . . . . *cf. Attocknie V. Udall*, 261 F. Supp. 876 (D.C.W.D. Okl. 1966), reversed on other grounds, 390 F. 2d 636 (C.A. 10th Cir.), cert. denied, 393 U.S. 833, 89 S. Ct. 104, 21 L. Ed. 2d 104 (1968)."

CONCLUSION

The decision of the United States Court of Appeals for the Tenth Circuit in this case is in full accord with this Court's ruling in *Tooahnippah v. Hickel, supra*, both as to the extent and scope of judicial review by the lower federal courts sitting in their appellate capacity, as well as to the issue of the responsibility of the Secretary of Interior in such Indian will cases.

Accordingly, these Respondents respectively request that the Petition for Writ of Certiorari filed herein by Petitioners be denied for failure to present an appealable issue to this Court.

Respectfully submitted,
HARVEY PAYNE
LANCE A. POOL
Attorneys For Non-Governmental Respondents

(3)

Supreme Court, U.S.
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No. 86-1761

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a 1978 amendment to the Osage Wills Act (Act of Apr. 18, 1912, ch. 83, 37 Stat. 86) requires the Secretary of the Interior to disapprove an otherwise valid will solely because the Indian testatrix disinherited some of her heirs at law.

2. Whether the Secretary's approval of the testatrix's will was against the clear weight of the evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 86-88) is unreported. The opinion of the district court (Pet. App. 74-85) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1986, and a petition for rehearing was denied on February 4, 1987 (Pet. App. 89). The petition for a writ of certiorari was filed on May 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Margaret Shunkamolah, an Osage Indian and a resident of Osage County, Oklahoma, died on January 16, 1981. She left an estate consisting of property subject to statutory restrictions against alienation, including a 3.59166

interest in Osage headrights valued at $690,891.78. Her will, dated April 17, 1978, as amended by a codicil to the will dated July 22, 1978, devised and bequeathed her property, in pertinent part, as follows (Pet. App. 76):

> To son Joseph Lee Shunkamolah, Jr. - .59166 Osage headright interest;
>
> To daughter Gladys Belle Rouwalk - two Osage headrights, * * * [and the] residue of real and personal property[;]
>
> To daughter Lottie A. Pratt [petitioner herein] - $5.00
>
> To daughter JoAnn Shunkamolah Alred [petitioner herein] - $5.00.

The testatrix also divided one Osage headright and cash among various grandchildren. The will provided the following explanation for the testatrix's testamentary plan (Pet. App. 36-37, 76-77):

> LOTTIE A. PRATT, daughter, the sum of $5.00. The reasons that I give only $5.00 to Lottie Pratt is because I have heretofore in my lifetime, given her forty (40) acres, with a home thereon and improvements thereon.
>
> Further, I have given Lottie an additional one hundred twenty (120) acres of pasture land. I supported Lottie A. Pratt, my daughter, and her three (3) sons for 19 years; providing all of the food, utilities, cost of transportation and have given automobiles to her children, in order that they could commute from Oklahoma Military Academy and other schools to Lottie's home, and I have provided during the 19 years for numerous trips and vacations for Lottie and her three sons, therefore, she has been well provided for during my lifetime.
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> JoANN SHUNKAMOLAH ALRED, daughter, the sum of $5.00. JoAnn has been given by me, for many

years, help with her support, upkeep, transportation and the purchase of automobiles. JoAnn filed a lawsuit in the District Court, Osage County, against me, which not only defamed my reputation, but it caused me great embarrassment and humiliation, and I then stopped giving her any more money. She has been hateful, mean, hostile and ugly toward me. I do not understand why she felt this way toward me, after I brought her into this life and helped her for so many years. This explains why I am only giving her $5.00 under this my Last Will and Testament.

2. Congress has conferred on the district courts of Oklahoma probate jurisdiction over the property of deceased Osage Indians. See Section 3 of the Act of Apr. 18, 1912 (the 1912 Act), ch. 83, 37 Stat. 87, as amended by Section 5(b) of the Act of Oct. 21, 1978 (the 1978 Amendment), Pub. L. No. 95-496, 92 Stat. 1662. However, the will of an Osage Indian that disposes of his or her Osage headright interest or other restricted property can be admitted to probate only after the Secretary of the Interior determines that the will is valid (Section 8 of the 1912 Act (37 Stat. 88), as amended by Section 5(a) of the 1978 Amendment (92 Stat. 1661)). Pursuant to implementing regulations, 25 C.F.R. 17.1-17.14, the Field Solicitor of the Pawhuska Field Office, who is the designated special attorney for the Osage Indians, conducts a hearing on the record as to the validity of the will. The Field Solicitor then transmits the record of the hearing to the Superintendent of the Osage Agency who determines the validity of the will on behalf of the Secretary. Dissatisfied legatees or would-be legatees may appeal the Superintendent's determination to the Regional Solicitor, Southwest Region, in Tulsa, Oklahoma (25 C.F.R. 17.14(b)). The Regional Solicitor's review of the Superintendent's determination constitutes final agency action from which appeal lies in federal district court (Section 8 of the 1912 Act, as

amended by Section 5(a) of the 1978 Amendment). The 1912 Act, as amended, specifies that the Superintendent's decision shall not be reversed unless it is "against the clear weight of the evidence" (§ 5(a), 92 Stat. 1661-1662).

3. Margaret Shunkamolah's will was approved by the Superintendent on October 22, 1982, in accordance with the above-described statute and regulations (Pet. App. 1-4). Two of the testatrix's daughters, petitioners Lottie A. Pratt and JoAnn Shunkamolah Alred, who received only $5 each under the will, appealed the Superintendent's decision to the Regional Solicitor. The Regional Solicitor affirmed the order of the Superintendent on July 27, 1983 (*id.* at 33-53).

The Regional Solicitor found that the will had been executed by the testatrix in accordance with Oklahoma law before two witnesses to whom the testatrix declared the document to be her will (Pet. App. 39-41). He further found that, although there was conflicting evidence concerning the testatrix's mental capacity, the evidence as a whole indicated that the testatrix was mentally competent and possessed the requisite testamentary capacity under Oklahoma law at the time she executed the will (*id.* at 42-44). The Regional Solicitor also found that, although the testatrix had lived with and been cared for by her daughter, respondent Gladys Rouwalk, during the last years of her life, there was insufficient evidence that the disinheritance of petitioners was the result of undue influence exercised by Rouwalk (*id.* at 44-46, 49-52). He found that the provisions of the will revealed that the testatrix had "conceived a rational scheme for the testamentary disposition of her property" and provided "a lucid justification of the bequests about which she anticipated questions would be raised" (*id.* at 45-46). Finally, the Regional Solicitor rejected petitioners' contention that the will, which was valid under Oklahoma law and reflected a rational testamentary scheme, should be disapproved as "inequitable" to petitioners (*id.* at 46-48).

4. Petitioners appealed the final decision of the Secretary to the United States District Court for the Northern District of Oklahoma, challenging the constitutionality of the 1978 Amendment as well as the findings that the testratrix possessed testamentary capacity and was not unduly influenced at the time she executed the will. The district court affirmed the Secretary's decision approving the will as not against the clear weight of the evidence (Pet. App. 74-85). The district court also held that the 1978 Act was a constitutional exercise of congressional authority based on the "special relationship between the federal government and restricted Indians" (*id.* at 78-80).

5. The court of appeals affirmed (Pet. App. 86-88). It rejected petitioners' constitutional challenge, relying on the "long recognized" congressional authority to regulate the probate of Indian estates (*id.* at 87). The court of appeals also rejected petitioners' contention that the 1978 Amendment had repealed the 1912 Act's adoption of Oklahoma law for determining the validity of Osage wills. Petitioners argued that the 1978 Amendment created special federal presumptions and burdens of proof favoring Indian heirs that preempt Oklahoma law. The court, however, interpreted the 1978 Amendment to retain the 1912 Act's incorporation of Oklahoma law regarding will execution and testamentary capacity. Pet. App. 87-88. Finally, the court of appeals upheld the district court's conclusion that the Secretary's findings—that the testatrix possessed testamentary capacity, that the will was properly executed, and that the testatrix was not subjected to undue influence—were not against the clear weight of the evidence (*id.* at 88).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Petitioners' contention that the 1978

Amendment to the 1912 Act requires the Secretary to disapprove the will solely because the testatrix disinherited some of her heirs at law is contradicted by the statutes in question, their legislative histories, and this Court's decision in *Tooahnippah* v. *Hickel*, 397 U.S. 598 (1970). Petitioners' other challenges to the validity of the will are simply challenges to the fact-finder's weighing of the evidence and present no legal issue of any importance. Accordingly, this case does not warrant further review.

1. Petitioners contend (Pet. 3-8) that the 1978 Amendment repealed the 1912 Act's requirement that the Secretary apply Oklahoma law in determining the validity of Osage wills. They argue that the Secretary must disapprove any will which disinherits Osage Indian heirs even if the will is otherwise valid under Oklahoma law. Petitioners base this interpretation on a single word added to the statute by the 1978 Amendment. Section 8 of the 1912 Act provided that any competent adult member of the Osage Tribe may dispose of his estate "by will, in accordance with the laws of the State of Oklahoma." Section 5(a) of the 1978 Amendment substituted the provision that an adult Osage Indian may dispose of his estate "by will *executed* in accordance with the laws of the State of Oklahoma" (emphasis added). From the addition of the word "executed," petitioners infer that Congress intended that only Oklahoma law regarding the technical requirements of execution would apply to Osage wills. In place of Oklahoma law's standard for testamentary capacity, petitioners contend that the 1978 Amendment substituted a sort of "heir-protective" federal common law which governs the Secretary's approval of Osage wills. There is no support for that contention in the language of either the 1912 Act or the 1978 Amendment. Furthermore, as the court of appeals correctly noted (Pet. App. 87), the legislative history of the 1978 Amendment clearly shows

that Congress did not intend to alter the Secretary's application of Oklahoma law to Osage wills. See H.R. Rep. 95-1459, 95th Cong., 2d Sess. 4, 6 (1978); S. Rep. 95-1157, 95th Cong., 2d Sess. 7, 10, 15 (1978).[1]

Petitioners also contend (Pet. 5) that this Court held in *Tooahnippah* v. *Hickel, supra*, that the Secretary must withhold approval of an Indian will, even though the will meets the state law requirements for validity, if the will disinherits a natural object of the testator's bounty. Petitioners have simply misread that case, which in fact holds precisely the opposite. In *Tooahnippah*, the Regional Solicitor, exercising his authority under an analogous statute, disapproved the will of a Comanche Indian which disinherited the testator's illegitimate daughter in favor of his niece. The Regional Solicitor acknowledged that the will was otherwise valid, but based his decision on his own view of what constituted "just and equitable treatment" of the testator's heir at law. 397 U.S. at 602. This Court reversed the Regional Solicitor's decision, holding that the statute had not authorized him to revoke or rewrite an Indian's will that reflected "a rational testamentary scheme" simply because the Regional Solicitor felt that the disposition of the estate was not "just" and "equitable" (397 U.S. at 609-610).

The Regional Solicitor in the instant case found that the testatrix's will reflected a rational testamentary scheme by devising and bequeathing the bulk of her estate to the daughter who cared for her in her last years and by disinheriting the two daughters to whom she stated she had already given land and money during her lifetime (Pet. App. 45-46, 50). This finding was affirmed by the district court (*id.* at 83) and by the court of appeals (*id.* at 88). Petitioners do not

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[1]Petitioners claim (Pet. 6) support for their statutory interpretation in a "Congressional Committee of the Whole Colloquy" but offer no citation to the Congressional Record or any other source.

challenge the rationality of the testatrix's disposition in the will. They argue only that, as the testatrix's heirs at law, they have a right to inherit her estate. No such right is to be found in the 1912 Act or the 1978 Amendment; nor has one been recognized in any decision of this Court.

2. Petitioners' remaining arguments (Pet. 8-17) challenge the Regional Solicitor's factual findings. First, petitioners contend (Pet. 8-10) that the will was not executed as required by Oklahoma law because one of the attesting witnesses had not clearly remembered the testatrix's actions and statements. However, applying Oklahoma law, the Regional Solicitor determined that the self-proving affidavit executed by the witness at the time he witnessed the will was sufficient evidence to show that the witness had observed the testatrix declare the instrument to be her will and request the witnesses to sign it (Pet. App. 39-40). The Oklahoma statute governing self-proved wills, Okla. Stat. Ann. tit. 84, § 55 (West Supp. 1987), provides that self-proved wills shall be admitted to probate without the testimony of any subscribing witnesses "unless contested." Petitioners misinterpret (Pet. 10) the caveat "unless contested" as nullifying the effect of the self-proving affidavit if the will is contested. However, Oklahoma case law makes clear that the self-proving attestation of the witnesses creates a rebuttable presumption of due execution which makes the testimony of those witnesses unnecessary for the proponent's case in chief. The contestant must present affirmative evidence that the will was not properly executed to overcome the presumption created by the self-proving affidavits. *Hobbs* v. *Mahoney*, 478 P.2d 956, 958-959 (Okla. 1970); *In re Estate of Lambe*, 710 P.2d 772, 775 (Okla. Ct. App. 1985). No such evidence was presented here.

Second, petitioners argue (Pet. 10-13) that the Regional Solicitor's finding that the testatrix had testamentary capacity is contrary to the clear weight of the evidence. The

Regional Solicitor acknowledged that the evidence of the testatrix's mental capacity was "conflicting" (Pet. App. 42). The Regional Solicitor concluded, however, that the evidence supported the finding of the hearing officer that the testatrix had testamentary capacity and that, since the hearing officer had an opportunity to observe the demeanor of the witnesses, his finding should not be disturbed (*id.* at 43-44). Petitioners' recitation of some of the evidence describing episodes of senility and hallucination experienced by the testatrix does not show that the Regional Solicitor's finding of testamentary capacity was against the clear weight of the evidence *as a whole*.

Finally, petitioners challenge (Pet. 13-17) the Regional Solicitor's finding that the will was not the product of undue influence. The Regional Solicitor found that, although the testatrix lived with and was cared for by respondent Rouwalk during the last years of her life, there was insufficient evidence to show that any influence respondent Rouwalk may have had over the testatrix was sufficient to "destroy the free agency" of the testatrix (Pet. App. 44-46, 49). The Regional Solicitor further found that, even if a presumption of undue influence were raised by respondent Rouwalk's close relationship to the testatrix, the testatrix's access to the independent advice of her conservator rebutted the presumption of undue influence (*id.* at 51-52).

Petitioners contend (Pet. 13-14) that this reliance on the testatrix's access to her conservator is unwarranted because he did not discuss with her the specific terms of her will as drawn and executed in 1978. However, the conservator testified that in 1977 the testatrix had discussed with him the terms of an earlier will by which she had disinherited petitioners and, despite his warnings that her will would be challenged if she disinherited some of her children, she remained firm in her resolve not to leave certain of her children any of her estate because she said they had treated

her badly and she had already given them money and property (Pet. App. 54-57). The "independent advice" which, under Oklahoma law, is sufficient to overcome a presumption of undue influence need not be advice given at the time the will is actually drafted; all that is required is "that the testator had the benefit of conferring fully and privately about the consequences of [the] intended will." *White* v. *Palmer*, 498 P.2d 1401, 1406 (Okla. 1972). The Regional Solicitor correctly determined that the testatrix's access to her conservator and her conversations with him concerning her testamentary intentions met that test.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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